04-1225

Supreme Court, U.S.
FILED
MAR 9 - 2005
OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

STEPHEN S. ADAMS AND 14,302 OTHER SIMILARLY SITUATED PLAINTIFFS,

PETITIONERS,

v.

UNITED STATES,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether the federal government can withhold and confiscate the wages that it owes its employees, for work already performed, without paying just compensation under the Takings Clause.

(2) Whether monetary obligations of the United States qualify as property protected by the Takings Clause.

(3) Whether legislation retroactively abrogating federal employees' meritorious wage claims against the United States for work already performed violates the Due Process Clause.

LIST OF PARTIES

Petitioners are Stephen S. Adams and 14,302 individuals who are current and former employees of the United States. The names of all petitioners were filed with the Court of Federal Claims as part of the record submitted when the case was transferred from the United States District Court for the District of Columbia. Upon consultation with the clerk's office of this Court, petitioners do not list each petitioner's name. Should the Court require such information, petitioners will provide it forthwith.

The respondents are the United States of America, United States General Accounting Office (now called the "Government Accountability Office"), Richard J. Watkins (Assistant Director, Bureau of Alcohol, Tobacco, and Firearms), the Bureau of Tobacco, Alcohol and Firearms, Retha M. Fulmore (Deputy Assistant Administrator, Office of Personnel, Drug Enforcement Administration), the Drug Enforcement Agency, Darlene Berthod (National Director of Personnel, Internal Revenue Service), the Internal Revenue Service, John P. Helm (Assistant Chief Counsel (Administration), United States Customs Service), the United States Customs Service, Susan T. Tracey (Chief, Personnel Division, United States Secret Service), the United States Secret Service), the United States Department of Justice, the United States Department of the Treasury, and the Office of Personnel Management.

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OPINIONS BELOW

The decision of the District Court for the District of Columbia is reported at 946 F. Supp. 37. Pet. App. 74a-90a. The District Court's denial of petitioners' motion for reconsideration is unpublished. Pet. App. 65a-73a. The D.C. Circuit's opinion is reported at 154 F.3d 420. Pet. App. 54a-64a; its denial of the petition for rehearing en banc is unpublished. Pet. App. 54a. The District Court's order transferring the remaining claims to the Court of Federal Claims is unpublished. Pet. App. 52a-53a.

The Court of Federal Claims' opinion is unpublished. Pet. App. 25a-51a. The Federal Circuit's opinion is reported at 391 F.3d 1212. Pet. App. 1a-24a.

JURISDICTION

The Federal Circuit issued its opinion on December 9, 2004, resolving the Takings issues in this case. Pet. App. 1a-24a. This Court has jurisdiction under 28 U.S.C. § 1254(1). The Due Process issues in this case were decided earlier by the D.C. Circuit. This Court has jurisdiction over those issues as well because an otherwise timely petition for certiorari may raise any issues decided earlier in the case. *See, e.g., Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 508 n.1 (2001) (*per curiam*).

The circumstance that this case was transferred to the Court of Federal Claims to resolve the Takings claims should not affect this Court's power to review the constitutional issues decided by both Circuits. But this Court's rules do not indicate whether the appropriate procedure is to file a separate petition to the D.C. Circuit on the Due Process issues, or instead to include both the Takings and Due Process issues in this one. After consulting with the Clerk's Office, and out of an abundance of caution, petitioners have done both.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The appendix reproduces the provisions of the Fifth Amendment, of Section 640 of the 1995 Treasury, Postal

Service and General Government Appropriations Act, Pub. L. No. 103-329, 108 Stat. 2382, 2432 (1994), and of Public Law No. 104-52, 109 Stat. 468, 468–69 (1995), involved in this case. Pet. App. 91a-92a.

STATEMENT OF THE CASE

In the years since this Court's divided 4-4-1 decision in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), the Federal Circuit has developed a new Takings jurisprudence under which money and monetary obligations are almost never considered property. That jurisprudence led the Federal Circuit to hold here that the wages owed by the United States to its employees, for work already performed, are not property and may be withheld, and confiscated for the government's own use, without compensation.

That is a profound and far-reaching error. The federal government employs nearly four million military and civilian employees,[1] none of whom now have an enforceable right to the wages they are owed for work they have already performed. More broadly, the Federal Circuit's reasoning suggests that anyone who does business with the United States on terms set by statute is essentially at the government's mercy, and that whether the government will honor its side of a bargain *for goods or labor it has already accepted* is just a matter of legislative grace. That cannot be the law. This Court consistently has held that the Takings Clause requires the United States to stand behind its financial obligations. And it squarely has held that States cannot nullify the wages owed to State employees for work already performed. There is no coherent reason to give the earned wages of federal employees any less protection.

Petitioners are 14,303 federal law enforcement officers and other federal employees who worked for the United

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[1] Recent government estimates are 1,426,836 active duty military employees (*see* http://web1.whs.osd.mil/mmid/M05/hst0409.pdf (last visited February 25, 2005)), and 2,457,785 civilian employees (*see* http://www.opm.gov/feddata/html/2004/september/table1.asp (last visited February 25, 2005)).

States in exchange for wages promised them by the statutes governing their employment. On November 18, 1995, petitioners had valid administrative claims pending against the United States to collect overtime pay it owed them, but had unlawfully refused to pay. The next day the United States abrogated those debts by enacting a statute that retroactively shortened the statute of limitations and time-barred their claims. That was a Taking of petitioners' property for which compensation remains due.

Petitioners originally brought challenges under both the Takings and Due Process Clauses in the District Court for the District of Columbia. The D.C. Circuit rejected their Due Process claim on the merits but held that it lacked jurisdiction over the Takings issues, and the case was transferred to the Court of Federal Claims ("COFC"). Because *Eastern Enterprises* creates doubt about the interplay between the two Clauses, this Court should grant review of the Due Process issues as well.

1. Factual Background

Because the Federal Circuit affirmed the COFC's grant of the United States' motion to dismiss, the allegations of the complaint, summarized below, must be accepted as true.

In 1974, Congress extended the overtime provisions of the Fair Labor Standards Act, 29 U.S.C. § 201 ("FLSA"), to the federal government, expressing its conviction that when the United States acts as an employer it should generally be bound by the same regime it imposes on private sector employers.[2] The government thereafter resisted that mandate by adopting a broad interpretation of the statutory exemptions for "bona fide executive, administrative, or professional" employees (*see* 29 U.S.C. § 213(a)(1)) to deny FLSA overtime pay to large classes of federal employees. After years of litigation it is now clear that the United States' position was, in large measure, unlawful—and that

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[2] *See* Pub. L. No. 93-259, 88 Stat. 55, 58–62 (1974) (pertinent part codified at 29 U.S.C. § 203(e)(2)(A) (1988)); S. Rep. No. 93-690, at 1–2 (1974); H.R. Rep. No. 93-913, at 9 (1974), 1974 U.S.C.C.A.N. 2811, 2819.

many of its employees, including petitioners, were wrongly deprived of overtime compensation they were entitled to.[3]

Petitioners worked as criminal investigators and in other positions for the United States Secret Service, the United States Customs Service, the Bureau of Alcohol, Tobacco and Firearms, the Drug Enforcement Administration, the Internal Revenue Service, and other federal agencies. For many years, the United States failed to pay them the overtime compensation they were due, because it erroneously classified them as FLSA-exempt.

Commencing February 1990, petitioners filed administrative claims with the General Accounting Office ("GAO") to recover the back overtime compensation that the United States owed them. Consistent GAO and Office of Personnel Management ("OPM") precedent stretching back to 1978 established that the Barring Act's six-year statute of limitations governed petitioners' administrative claims.[4] Because a separate FLSA claim accrues each pay period, petitioners expected to recover six years of back overtime pay through GAO's administrative process. Petitioners also simultaneously filed actions in the COFC, which were consolidated and styled *Adams v. United States*, No. 90-162C, and consolidated cases ("*Adams I*"). The statute of limitations applicable to those judicial claims was two years, or three years if the violations were willful. 29 U.S.C. § 255(a). GAO stayed petitioners' administrative claims

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[3] *See, e.g., Adams v. United States*, 27 Fed. Cl. 5 (1992), *rev'd in part and remanded*, 178 F.3d 1306, 1998 WL 804552 (Fed. Cir. 1998) (unpublished decision); *Berg v. Newman*, 982 F.2d 500 (Fed. Cir. 1992), *on remand sub nom. Berg v. United States*, 49 Fed. Cl. 459, 478 (2001) (finding that the United States "has not carried its burden of demonstrating that the plaintiffs were exempt from the overtime pay provisions of the [FLSA]"); *Am. Fed'n of Gov't Employees v. Office of Personnel Mgmt.*, 821 F.2d 761, 769–71 (D.C. Cir. 1987).

[4] *See, e.g., In re Transp. Sys. Ctr.*, 57 Comp. Gen. 441 (1978); *see also In re Tomkowiak*, 67 Comp. Gen. 247 (1988); *In re Fed. Firefighters*, 68 Comp. Gen. 681 (1989); *accord* Federal Personnel Manual ("FPM") Letter 551-15 (1978) (announcing OPM's adoption of six-year limitations period).

pending the outcome of the *Adams I* litigation in the COFC. Petitioners' First Amended Complaint ("Complaint") ¶ 11, JA25.[5]

On cross-motions for summary judgment in late 1992, the COFC held that the GS-9 and GS-11 criminal investigators at all of the above-listed agencies and the GS-12 investigators at the Customs Service, were non-exempt and therefore entitled to recover back wages under the FLSA. *Adams v. United States*, 27 Fed. Cl. 5, 28–29 (1992). The COFC held that the GS-13 criminal investigators, and the GS-12 criminal investigators at every agency except the Customs Service, were FLSA-exempt. *Id.* at 29. The Federal Circuit vacated the latter ruling, see *Adams v. United States*, 178 F.3d 1306, 1998 WL 804552 (Fed. Cir. 1998) (unpublished decision), and remanded to the COFC.[6]

In March 1994, the Justice Department entered into settlement agreements with the petitioners whose entitlement to FLSA overtime had been established by the COFC. Those settlements gave each entitled employee two years of back overtime pay, without prejudice to their administrative claims still pending before GAO, which sought an additional four years of back wages consistent with the longer administrative statute of limitations. Complaint ¶ 13, JA25–26. Petitioners then requested a meeting with GAO "to discuss how to achieve a prompt resolution" of their pending administrative FLSA claims. *Id.* ¶ 14, JA26.

Instead, a week later, the Comptroller General overruled 16 years of settled GAO precedent and held that the statute of limitations for administrative FLSA claims was two years, not six. *In re Joseph M. Ford*, 73 Comp. Gen. 157 (1994). The Comptroller General also held that the

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[5] JA citations refer to the joint appendix filed in the Federal Circuit.

[6] On December 1, 2004, the COFC granted the motion for summary judgment as to liability filed by the GS-13 criminal investigators. *Adams v. United States*, No. 90-162C (Fed. Cl. Dec. 1, 2004) (unpublished).

shorter period would be applied retroactively to all cases then pending before GAO. *Id.* at 161–62.

Congress recognized the patent unfairness of GAO's retroactive application of *Ford*, and partially overruled it by statute. Section 640 of the 1995 Treasury, Postal Service and General Government Appropriations Act, Pub. L. No. 103-329, 108 Stat. 2382, 2432 (1994) ("Section 640"), which became law on September 30, 1994, provided that "the Comptroller General of the United States shall apply a 6-year statute of limitations to any claim of a Federal employee under the Fair Labor Standards Act of 1938 (29 U.S.C. § 201) for claims filed before June 30, 1994." Congress thus recognized that GAO's two-year statute of limitations should not be applied retroactively to claims pending when *Ford* was decided.

When petitioners renewed their efforts to resolve their administrative claims, GAO acknowledged that Section 640 had "modified our *Ford* decision to allow Federal employees to claim an entitlement to FLSA overtime for an additional four years, provided a claim was filed before June 30, 1994." *See* Complaint ¶ 21, JA28. GAO insisted, however, that its "regulations require that the agency from which the claim originated shall initially adjudicate the claim." *See id.*, JA28–29. Petitioners accordingly asked the relevant agencies to resolve the back pay claims. *Id.* ¶ 23, JA29–30. On January 27, 1995 the Deputy Assistant General Counsel of the Department of the Treasury circulated a memorandum concluding that Section 640 "gives specific authority to apply a six-year statute of limitations exclusively to the Comptroller General," not to the agencies themselves. *See id.* ¶ 24, JA30–31. By May 9, 1995, all of the relevant agencies had denied petitioners' claims on that ground. *Id.* ¶¶ 25–26, JA31.

By May 12, 1995, petitioners had appealed all of those agency decisions back to GAO under 4 C.F.R. § 31.4. Rather than act upon these indisputably meritorious appeals, however, GAO stalled to give the interested agencies time to lobby Congress for legislation extinguishing petitioners'

back pay claims. It simply did not respond to petitioners' letters (*see* Complaint ¶¶ 31, 33, JA34, 35), and counsel for GAO declared in another pending, similar case that GAO "does not intend to issue a decision . . . until the Treasury-Postal Service and General Government Appropriations Bill, 1996 . . . is enacted (because of the possible retroactive repeal of § 640 . . .)." Complaint ¶ 31, JA34. Various high-ranking government officials lobbied for the repeal of Section 640, *id.* ¶¶ 28–29, JA33, and the Treasury Department submitted proposed statutory language for Congress's consideration, *id.* ¶ 36, JA36.

Those efforts bore fruit on November 19, 1995, when Congress enacted Public Law No. 104-52, 109 Stat. 468, 468–69 (1995). This legislation amended Section 640 to provide that GAO's six-year statute of limitations "shall not apply to any claim where the employee has received any compensation for overtime hours worked during the period covered by the claim under any other provision of law, including, but not limited to, 5 U.S.C. § 5545(c), or to any claim for compensation for time spent commuting between the employee's residence and duty station." The 1995 statute reduced the administrative statute of limitations for practically all pending federal employee FLSA claims to two years—eliminating the government's obligation to pay four additional years' backpay—because the vast majority of entitled employees had received *some* compensation for their overtime hours under other provisions of law (at, or in many cases below, their regular hourly rate—not the time-and-a-half guaranteed by the FLSA) or were entitled to compensation for time they were required to spend driving to and from work in a government vehicle.[7]

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[7] Employees were entitled to compensation for this time when they were required to drive a government vehicle to and from work in order to be able to respond promptly to emergencies. *See* FPM Letter 551-10 (1976). They could drive such vehicles only for official purposes. *See, e.g.*, 31 U.S.C. §§ 1344, 1349(b); 41 C.F.R. § 101-38.301 (1998).

When Representative Lightfoot introduced the 1995 statute, he explained that without some change in the law the United States would owe its employees "as much as $460 million . . . for work done many years ago." 141 Cong. Rec. 32597 (1995). Representative Lightfoot justified the United States' repudiation of its debts to its employees by proclaiming that the bill would simply "give the Federal workers the same rights [i.e., a two-year statute of limitations] as their private sector counterparts." *Id.* (He did not acknowledge the trenchant difference that obviously motivated Congress in 1994—that federal employees, unlike their counterparts in the private sector, had long been on express notice from GAO and OPM that they had six years, rather than two, in which to assert their rights.)

2. Procedural History

Petitioners originally filed this action in the United States District Court for the District of Columbia. The District Court held that Congress's retroactive elimination of petitioners' claims was permissible under the Due Process Clause because it rationally furthered the legitimate purpose of equalizing the statutes of limitations governing FLSA claims of federal and other employees. Pet. App. 85a. It also held that the law did not effect a Taking. Pet. App. 87a. The D.C. Circuit affirmed the dismissal of petitioners' Due Process claims for the reasons stated by the District Court. Pet. App. 60a. The D.C. Circuit held that it lacked jurisdiction over petitioners' Takings claims, however. On remand, the District Court transferred the case to the COFC.

After transfer, the COFC dismissed petitioners' Takings claims. Noting the Federal Circuit's holding in *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1340 (Fed. Cir. 2001), *cert. denied*, 535 U.S. 1096 (2002), that the Takings Clause is not implicated when the government imposes obligations to pay money on private parties, the COFC reasoned that "the case at bar is the very reverse—it is the government that is alleged to have an obligation to

pay money," and concluded that "this is a distinction without a difference." Pet. App. 40a.

The Federal Circuit affirmed. It acknowledged the settled law that contractual debts of the United States are property. Pet. App. 15a-16a. But it held that petitioners' right to overtime pay for work already performed is a purely *statutory* obligation, and that "no statutory obligation to pay money, even where unchallenged, can create a property interest within the meaning of the Takings Clause." Pet. App. 21a-22a. The Federal Circuit thought that conclusion required by Justice Kennedy's concurrence and Justice Breyer's dissent in *Eastern Enterprises*.

The Federal Circuit distinguished this Court's decision in *United States v. Larionoff*, 431 U.S. 864 (1977), as merely involving "enforcing a statutory entitlement to compensation for employment, not recognizing the predicate for a takings claim." Pet. App. 12a. The Federal Circuit failed to acknowledge that this Court had invoked the doctrine of constitutional doubt in *Larionoff*—interpreting the statute not to revoke a re-enlistment bonus for soldiers already entitled to it, to avoid the serious questions that such revocation would raise under the Takings Clause.

The Federal Circuit also recognized this Court's holding in *Fisk v. Jefferson Police Jury*, 116 U.S. 131 (1885), that the statutes governing the pay of *State* employees create a unilateral contract that can be enforced against a State under the Contracts Clause once the work is performed. Pet. App 13a. It distinguished *Fisk* on the ground that it was "decided under the Contracts Clause, not the Takings Clause." Pet. App. 14a. The Federal Circuit did not reconcile that distinction with its earlier holding that petitioners' Takings claims fail only because petitioners' rights against the government are not contractual in nature.

Finally, the Federal Circuit distinguished *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155 (1980), and *Phillips v. Washington Legal Found.*, 524 U.S. 156 (1998)—

which held that the government's seizure of interest earned on a private bank account is a *per se* Taking—on the ground that monetary obligations can be property if they relate to a "fund of money," but not if they are "ordinary obligation[s] to pay money." Pet. App. 21a.

REASONS FOR GRANTING THE WRIT

The Federal Circuit held that the United States can withhold and confiscate the wages it owes petitioners (and the rest of its military and civilian employees) for work they have already performed, so long as Congress's reason for confiscating their wages satisfies Due Process review. It reached that extraordinary conclusion for several reasons.

First, the Federal Circuit held that federal employees' right to receive wages for work already performed is merely a statutory expectation akin to welfare recipients' expectation that they will continue to receive welfare checks in the future. That premise is wrong. This Court has squarely held that the statutory pay owing to State employees becomes a constitutionally protected *contractual* right once the work has been performed. There is no legal reason the earned pay of federal employees should be different. Indeed, when faced in *Larionoff* with a statutory amendment that appeared to withdraw a statutory re-enlistment bonus from soldiers who had already agreed to re-enlist, this Court invoked the doctrine of constitutional doubt to avoid that interpretation, citing cases holding that the United States cannot abrogate its *contractual* debts.

Second, even if petitioners' right to their earned wages were not contractual for constitutional purposes, the Federal Circuit erred by holding that "no statutory obligation to pay money, even where unchallenged, can create a property interest within the meaning of the Takings Clause." Pet. App. 21a-22a. This Court has never held that vested statutory entitlements can be confiscated without compensation, even when gratuitous. This Court certainly has not permitted the abrogation of statutory debts that rest on an explicit *quid pro quo*, like the wages at

issue here. Benefits promised by statute, and exchanges for value offered by statute, can always be modified *prospectively*. But they cannot be divested once earned.

The Federal Circuit concluded that statutes can never create property rights based on language in Justice Kennedy's concurrence and Justice Breyer's dissent in *Eastern Enterprises*, which the Federal Circuit treated as a holding. That rationale deepens an existing circuit split over whether *Eastern Enterprises* contains any holding of this Court at all. Regardless, the Federal Circuit missed the point of the language it cites. Justice Kennedy and the four dissenters argued that Takings review was redundant because, on the facts of *Eastern Enterprises*, the applicable Due Process and regulatory Takings tests would ask the same question: was the law fundamentally fair? But laws abrogating the United States' own obligations are not governed by the *regulatory* Takings test at all; this Court has consistently held that they are *per se* Takings. *Per se* Takings jurisprudence certainly is not identical to Due Process review, so Justice Kennedy's and Justice Breyer's reasoning does not apply here.

Third, the Federal Circuit held that monetary obligations can be property only if they relate to a "fund of money," but not if they are "ordinary obligation[s] to pay money." Pet. App. 21a. That conclusion is also based on a misunderstanding of *Eastern Enterprises*. Justices Kennedy and Breyer referenced the fact that *Webb's* and *Phillips* involved "fund[s] of money" (i.e., private bank accounts) in the course of distinguishing them from *Eastern Enterprises*. But their point was that the statutes in *Webb's* and *Phillips* had seized specific, pre-existing monetary debts (a bank's obligation to pay interest to its depositors) for the government's own use, whereas the statute in *Eastern Enterprises* imposed a new regulatory obligation to pay money from one private citizen to another. Nothing in Justice Kennedy's concurrence or Justice Breyer's dissent suggests that they would have endorsed the Federal Circuit's new rule—that specific, pre-existing debts owed by

banks are property, but specific, pre-existing debts owed by the federal government are not.

The Federal Circuit's opinion in this case deprives thousands of federal employees of the back wages they are legally owed, transforms the basic relationship between the United States and its nearly four million employees, and seriously distorts the holdings of at least eight decisions of this Court. And when combined with the D.C. Circuit's parallel holding in this case—that laws of this nature are subject merely to rational basis review under the Due Process Clause—the Federal Circuit's new rules produce results that this Court would clearly reject.

Every Justice of this Court concluded in *Eastern Enterprises* that retroactive legislation must be *fundamentally fair* as well as rational. But since this Court divided over whether its analysis should be located in the Takings or Due Process Clause, *Eastern Enterprises* technically produced no binding holding under either Clause. That gap permitted the D.C. and Federal Circuits to conclude in this case that laws altering or imposing monetary obligations can be reviewed only under the Due Process Clause, and that the appropriate test is merely rational basis. Under that reasoning, the statute at issue in *Eastern Enterprises* would be reviewed only for minimum rationality—the position that this Court *unanimously* rejected.

I. PETITIONERS' CONTRACTUAL RIGHT TO EARNED WAGES CANNOT BE ABROGATED WITHOUT JUST COMPENSATION

The Federal Circuit held that petitioners' right to their earned wages is a mere statutory expectation that can be revoked by statute with no constitutional consequences. That is patently incorrect. Those wages became a vested contractual right once the requisite work was performed, and the confiscation of that right was a Taking for which compensation is due.

A. Laws Abrogating Contractual Debts Of The United States Result In *Per Se* Takings

For more than a century this Court has held that "Congress does not have the power to repudiate its own debts, which constitute 'property' to the lender, simply in order to save money."[8] Such obligations are often assumed by contract, and the general rule is that "[w]hen the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals." *Lynch v. United States*, 292 U.S. 571, 579 (1934). *Lynch* held that, despite the financial exigencies of the Great Depression, the United States could not cancel war risk insurance policies issued under statutory authority to World War I veterans and their families. "The Fifth Amendment commands that property be not taken without just compensation," this Court concluded, and "[r]ights against the United States arising out of a contract with it are [property] protected by the Fifth Amendment." *Id.* Therefore, "Congress was without power to reduce expenditures by abrogating contractual obligations of the United States." *Id.* at 580. Another case of the same era held that Congress could not nullify the gold-standard clauses of the United States' public bonds. *See Perry v. United States*, 294 U.S. 330 (1935).

The federal government's abrogation of its own contractual debts is a classic *per se* Taking of private property for the government's "own use," not a regulatory measure incidentally impairing the value of property left in private hands.[9] That is how *Lynch* and *Perry* were

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[8] *Bowen v. Pub. Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 55 (1986); *see Sinking-Fund Cases*, 99 U.S. 700 (1878).

[9] The basic divide in this Court's Takings cases is between the "'classi[c] taking' in which the government directly appropriates private property for its own use," and regulatory measures which merely "prohibit a property owner from making certain uses of her private property" and thereby diminish the *value* of property left in private hands. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 321-23 (2002) (citation omitted). "When the government

analyzed, even though both came well after the birth of regulatory Takings jurisprudence in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). And the government certainly had rational bases for trying to abrogate its debts in those cases, but this Court treated those reasons as irrelevant.[10]

B. The Statutory Pay Owing To Federal Employees Becomes A Contractual Debt Once The Requisite Work Is Performed

The Federal Circuit acknowledged the settled law described above, but held that these federal employees had no contract with the United States that could be abrogated.

That is patently incorrect. When, as here, the terms of employment are set by statute, federal employees certainly cannot sue the United States for breach of contract claiming that their supervisors promised them more than the statute provides.[11] But that does not mean that federal employees have no contractual right to receive the statutory pay they are owed *for work already performed.* To the contrary, the statutes governing federal employment offer a unilateral

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physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner." *Id.* Regulatory measures that merely decrease the value of property left in private hands are evaluated under a balancing test that focuses on the character of the regulation, its economic impact, and whether it interferes with investment-backed expectations. *See, e..g., Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

[10] For instance, this Court conceded in *Lynch* that in "all government business economy had become urgent because of lessened revenues and the heavy obligations to be issued in the hope of relieving widespread distress." 292 U.S. at 580. And in *Perry* the United States abrogated the gold standard clauses of its own bonds in the course of broadly prohibiting *all* payment in gold clauses. 294 U.S. at 349.

[11] The Federal Circuit seems to have been invoking this principle when it observed that federal employees cannot rely on oral promises or other "government-fostered expectations" to claim benefits *inconsistent* with the statutes governing their employment. Pet. App. 15a. But petitioners are not seeking to hold the government to promises inconsistent with the statutes; they are seeking to enforce promises *made under those statutes.*

contract that becomes complete once the employee does the work.

This Court explained that distinction in *Fisk*, in which a Louisiana parish refused to pay the purely statutory wages owed to a district attorney for work already performed. This Court recognized that the statutes governing his employment implied "no contract which forbids the legislature or other proper authority to change the rate of compensation for salary or services *after the change is made*, though this may include a part of the term of the office then unexpired." *Fisk*, 116 U.S. at 133-34 (emphasis added). But the Court squarely held that those statutes *did* create a vested contractual obligation of the State to pay the wages promised by statute *for work already performed*: "[A]fter the services have been rendered, under a law, resolution, or ordinance which fixes the rate of compensation, there arises an implied contract to pay for the services at that rate. This contract is a completed contract." *Id.* This Court held that "[t]his obligation can no more be impaired by a law of the State than that arising on a promissory note." *Id.* at 134.

The Federal Circuit tried to distinguish *Fisk* on the grounds that it was decided under the Contracts Clause. But that is precisely the point. This Court held that a purely statutory obligation to pay wages *became* a contractual entitlement once the work was completed. Otherwise the Contracts Clause would not have applied at all. (There was no need to consider any Takings issue in *Fisk* because the Contracts Clause independently forbids States from abrogating their contracts.) That holding destroys the Federal Circuit's attempt to distinguish this case from cases like *Lynch* and *Perry* on the ground that this case does not involve "contractual" rights.

This case is exactly like *Fisk*, except that the employer here is the United States rather than an individual State. There is no reason the earned statutory pay of State employees should give rise to a unilateral contract but the earned statutory pay of *federal* employees can be revoked at

will.[12] Until now this Court has not been required to say so definitively, but in *Larionoff* it invoked the doctrine of constitutional doubt to avoid the "grave and doubtful constitutional questions" that would be raised by a law eliminating the pay owing to federal employees for work already performed.[13]

Larionoff interpreted a statutory amendment that could have been read to withdraw a reenlistment bonus, promised by statute, from soldiers who had already committed to reenlist. This Court acknowledged that a "'soldier's entitlement to pay is dependent upon statutory right,'" and that "accordingly the rights of the affected service members must be determined by reference to the statutes and regulations . . . rather than to ordinary contract principles." *Larionoff*, 431 U.S. at 869 (citation omitted). But, citing *Lynch* and *Perry*, this Court recognized that denying federal employees their fully earned *statutory* compensation for services already performed would raise the same constitutional concerns as abrogating any ordinary contractual debt:

> Of course, if Congress had such an intent, serious constitutional questions would be presented. No one disputes that Congress may prospectively reduce the pay of members of the Armed Forces, even if that reduction deprived members of benefits they had expected to be able to earn. It is quite a different matter, however, for Congress to deprive a service member of pay due for services already performed, but still owing. In that case, the congressional action would

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[12] The States are sovereign entities no less than the federal government, and their internal relationship with their employees is fundamentally the same. This Court has also recognized that the values underlying the Takings and Contracts clauses are similar, and that the Fifth Amendment stands in for the Contracts Clause to a substantial extent in federal cases. *See Sinking-Fund Cases*, 99 U.S. at 718–19.

[13] That articulation of the constitutional doubt test is from *United States ex rel. Attorney Gen'l v. Del & Hudson Co.*, 213 U.S. 366, 408 (1909).

> appear in a different constitutional light. Cf. *Lynch v. United States*, 292 U.S. 571 (1934); *Perry v. United States*, 294 U.S. 330 (1935).

Larionoff, 431 U.S. at 879 (citation omitted). In order to avoid those serious constitutional difficulties, this Court interpreted the statute in a way that did not eliminate the vested rights of soldiers who had already agreed to reenlist.

The Federal Circuit dismissed *Larionoff* as "inapposite" because it "involve[d] enforcing a statutory entitlement to compensation for employment, not recognizing the predicate for a takings claim." Pet. App. 12a. But *Larionoff* was decided on statutory grounds only because this Court, after invoking constitutional doubt, interpreted the statute to preserve the bonus for those soldiers who had already re-enlisted. This Court's reasoning makes it clear that, if the statute *had* withdrawn the bonus from soldiers entitled to it, then the Takings Clause would have been implicated. That is why this Court cited *Lynch* and *Perry*. As the Court of Appeals in *Larionoff* recognized, "once someone agrees to perform certain services in exchange for a given sum of money, and the Government has received that performance . . . the 'gratuity' becomes a contractual right." *Larionoff v. United States*, 533 F.2d 1167, 1189 (D.C. Cir. 1976). Lower courts in the years since *Larionoff* have consistently followed this Court in assuming that abrogation of such rights would be a Taking, and have interpreted statutes to avoid that result.[14]

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[14] In *Cherry v. United States*, 640 F.2d 1184 (Ct. Cl. 1980), the Federal Circuit's predecessor cited *Lynch* when interpreting a military pay statute to preserve wages already earned. "To tamper with [servicemen's right to their pay] by legislation, especially with respect to pay already accrued, would raise serious fifth amendment issues, as it might be held to constitute a taking." *Cherry*, 640 F.2d at 1187. And in *Costello v. United States*, 587 F.2d 424, 425 (9th Cir. 1978), *cert. denied*, 442 U.S. 929 (1979), the court noted that "[a]s to vested rights, the distinction between earned military pay and that to be earned in the future has long been recognized." The court proceeded "on the assumption, arguendo, that if retirement pay had been fully earned at the date of retirement it could not be divested without compensation." *Id.* at

Under the FLSA, petitioners "became absolutely entitled to the money when they worked the overtime."[15] They are therefore in precisely the same position as the district attorney in *Fisk* and the soldiers in *Larionoff*. The back wages the United States owed them were a contractual debt, and the law nullifying those debts was—as in *Lynch* and *Perry*—a *per se* Taking.[16]

II. STATUTORY DEBTS ARE PROPERTY PROTECTED BY THE TAKINGS CLAUSE

The Federal Circuit compounded its error by holding that "no statutory obligation to pay money, even where unchallenged, can create a property interest within the meaning of the Takings Clause." Pet. App. 21a-22a. That holding is an arbitrary limitation on the power of Congress. Property rights, including property rights to money, can certainly be created by federal statutes. The Federal

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427 n.2; *see also, e.g., Am. Fed'n of Gov't Employees v. Campbell*, 474 F. Supp. 357, 360 (D.D.C. 1979) ("[F]or this Court to allow defendants to deprive plaintiffs of pay due for services already performed but still owing would present serious Constitutional questions."), *aff'd in part, rev'd in part on other grounds*, 659 F.2d 157 (D.C. Cir. 1980), *cert. denied*, 454 U.S. 820 (1981); *Nat'l Ass'n of Retired Fed. Employees v. Horner*, 633 F. Supp. 511, 514 n.2 (D.D.C. 1986) (Congress "could not retroactively reduce the rate of pay for work already performed. [That] holding rests entirely upon a quid-pro-quo concept . . . ."), *aff'd*, 479 U.S. 878 (1986).

[15] *Donovan v. Sovereign Sec., Ltd.*, 726 F.2d 55, 58 (2d Cir. 1984); *see also, e.g., Cook v. United States*, 855 F.2d 848, 851 (Fed. Cir. 1988) ("[A] claim for unpaid overtime under the FLSA accrues at the end of each pay period when it is not paid.").

[16] The fact that the statute rendered those debts unenforceable by retroactively shortening the statute of limitations, instead of simply nullifying the debts, does not change the analysis. *See, e.g., Texaco, Inc. v. Short*, 454 U.S. 516, 528 (1982) ("when the practical consequences of extinguishing a right are identical to the consequences of eliminating a remedy, the constitutional analysis is the same."). This Court held in *Armstrong v. United States*, 364 U.S. 40 (1960), for example, that the government committed a Taking when its acquisition of a ship rendered liens held against that ship unenforceable for sovereign immunity reasons. The fact that the specific amounts petitioners are owed have not yet been calculated is also immaterial. The same was true in *Lynch*, *Perry*, *Webb's*, and *Phillips*.

Circuit's holding to the contrary is based on a misunderstanding of Justice Kennedy's concurrence and Justice Breyer's dissent in *Eastern Enterprises*.

A. Federal Statutes Can Create Property, Including Property In Monetary Obligations

This Court has held that the "property" protected by the Takings Clause is "'created and . . . defined by existing rules or understandings that stem from an independent source such as state law.'" *Webb's*, 449 U.S. at 161 (citation omitted). Federal statutes are no less potent than state common law in that regard. This Court has recognized, for example, that intellectual property created by statute, like patents and trademarks, is property protected by the Takings Clause.[17]

Of course, the usual presumption is that statutes are "'not *intended* to create private contractual or vested rights but merely declare[] a policy to be pursued until the legislature shall ordain otherwise.'" *Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 466 (1985) (*quoting Dodge v. Bd. of Educ.*, 302 U.S. 74, 79 (1937)) (emphasis added). But that presumption can be overcome if the statutory language or context fairly imply an intent by Congress to grant vested rights. *Dodge* indicated, for example, that a statute that "confirms a settlement of disputed rights and defines its terms" meets that threshold. 302 U.S. at 79. And this Court held in *Fisk* that statutes establishing the wages of public employees are intended to create binding rights which vest once the work is performed. Indeed, even gratuitous statutes create vested rights once a particular payment has been made, or become due. This Court has held that Congress can modify

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17 "That a patent is property, protected against appropriation both by individuals and by government, has long been settled." *Hartford-Empire Co. v. United States*, 323 U.S. 386, 415 (1945). *See also, e.g., College Savs. Bd. v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 673 (1999) (trademarks "are the 'property' of the owner because he can exclude others from using them.").

Social Security payments going forward, for example, *see Flemming v. Nestor*, 363 U.S. 603 (1960), but has never suggested that those payments are not property once recipients are entitled to receive them.[18]

B. *Eastern Enterprises* Does Not Hold That Statutory Obligations To Pay Money Are Immune From Takings Scrutiny

Eastern Enterprises does not speak to, much less overrule, the settled law that the government must pay just compensation if it abrogates its debts.

In *Eastern Enterprises*, this Court considered a statute that forced coal mine operators to cover medical expenses for miners and their dependents, including miners who had worked for other companies now defunct. A plurality opinion written by Justice O'Connor and joined by Chief Justice Rehnquist and Justices Scalia and Thomas concluded that the statute went too far in its retroactive impact, and was therefore a regulatory Taking under *Penn Central*.

A dissenting opinion written by Justice Breyer and joined by Justices Stevens, Souter, and Ginsburg argued that regulatory measures imposing an obligation on one private party to pay money to another private party should be analyzed only under the Due Process Clause. Their point was that such laws are constitutional only if the parties on whom liability is imposed are *responsible*, in some real sense, for the costs they are being asked to bear. If not, the law will fail Due Process; if so, it could never have the "character" of a regulatory Taking under *Penn Central*. Thus in their view the Takings Clause adds nothing useful to the constitutional analysis. The dissenters concluded that the Coal Act was not "fundamentally unfair," in part

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[18] *See, e.g., Brown v. Legal Found. of Washington*, 538 U.S. 216, 247 (2003) (Scalia, J., dissenting) ("May the government now seize welfare benefits, without paying compensation, on the ground that there was no 'net loss' to the recipient?") (citation omitted); *id.* at 252 ("[T]he rationale supporting today's judgment—what the government hath given, the government may freely take away—would be disastrous.").

because the coal companies had fostered an expectation that they would cover retiree health costs. *Eastern Enterprises*, 524 U.S. at 558-59. The dissenters were careful to clarify, however, that because the statutory liability in question flowed "not to the Government, but to third parties," the case could not have raised *per se* Takings questions. *Id.* at 555.[19]

Justice Kennedy agreed with the dissenters that regulatory Takings analysis adds nothing to Due Process review in cases involving the imposition of monetary liability from one private party to another.[20] (Like the dissenters, he was careful to distinguish *per se* Takings cases in which "the government physically acquires property for itself." *Id.* at 542.) Justice Kennedy concluded, however, that the Coal Act was unfairly retroactive and violated Due Process. This Court therefore split 4-4-1, and struck down the Coal Act without agreeing on any rationale.

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[19] They argued that "[t]his case involves not an interest in physical or intellectual property, but an ordinary liability to pay money, *and not to the Government, but to third parties.*" 524 U.S. at 554 (emphasis added). And when distinguishing *Webb's*, they stressed that "the monetary interest at issue there arose out of the operation of a specific, separately identifiable fund of money. *And the government took that interest for itself.*" *Id.* (emphasis added). In the case before them, by contrast, they emphasized that "there is no specific fund of money; there is only a general liability; and that liability runs not to the Government, but to third parties." *Id.*

[20] Like Justice Breyer, Justice Kennedy reasoned that the constitutionality of such statutes ultimately depends on a "normative judgment" concerning whether those parties are genuinely responsible for the regulatory problem Congress is trying to fix, and that regulatory Takings scrutiny would simply duplicate the Due Process analysis. *Id.* at 545 (Kennedy, J., concurring). Justice Kennedy, even so, did not categorically foreclose the use of regulatory Takings analysis in cases involving imposition of monetary liability. "My reading of *Connolly*, and *Concrete Pipe*, is that we should proceed first to general due process principles, reserving takings analysis for cases where the governmental action is otherwise permissible." 524 U.S. at 546 (Kennedy, J., concurring).

In *Commonwealth Edison*, the Federal Circuit treated the shared reasoning of Justice Kennedy and the dissenters as a holding, and concluded that no law "impos[ing] an obligation to pay money" can be a Taking, even if the money is to be paid to the government. *Commonwealth Edison*, 271 F.3d at 1339-40. In this case the Federal Circuit took a further unwarranted step and held that a law nullifying the government's debts to private individuals is not a Taking either. Pet. App. 22a.

The Federal Circuit's reasoning is profoundly mistaken. First, extracting a holding from Justice Kennedy's concurrence and four other Justices' *dissent* is improper. Divided opinions produce holdings only if a "narrowest grounds" for the decision can be gleaned from the opinion of a Justice concurring in the relevant judgment. *Marks v. United States*, 430 U.S. 188 (1977). Tallying votes from concurring and dissenting opinions is reading tea leaves instead of faithfully applying this Court's precedents. This Court has repeatedly instructed the lower courts to avoid such speculation. The Federal Circuit's exacerbation of a deep and acknowledged circuit split over the precedential status of *Eastern Enterprises* is reason enough for this Court to grant review, given the implications of that dispute for this critical area of the law.[21]

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[21] Like the Federal Circuit, the First Circuit has held that *Eastern Enterprises* has precedential effect on Takings Clause claims. *See Parella v. Ret. Bd. of the R.I. Employees' Ret. Sys.*, 173 F.3d 46, 58 (1st Cir. 1999) (holding that plaintiffs asserting a Takings Clause claim must establish an independent property right because "a majority of justices . . . concluded that a Takings Clause issue can arise only after a plaintiff's property right has been independently established"). However, the Second, Third, Fourth, Sixth, and D.C. Circuits have held that *Eastern Enterprises* either has no precedential effect, or that its holding is limited to similarly situated plaintiffs. *See United States v. Alcan Aluminum Corp.*, 315 F.3d 179, 189 (2d Cir. 2003); *Anker Energy Corp. v. Consol. Coal Co.*, 177 F.3d 161, 170 (3d Cir. 1999); *A.T. Massey Coal Co., Inc. v. Massanari*, 305 F.3d 226, 237 (4th Cir. 2002); *Franklin County Convention Facilities Auth. v. Am. Premier Underwriters, Inc.*, 240 F.3d

More importantly, the Federal Circuit misunderstood Justice Kennedy's and Justice Breyer's reasoning. Their point was that a law imposing liability on one private party to benefit another private party is at most a *regulatory Taking* and therefore governed by the *Penn Central* test. They reasoned that such a law that passed Due Process review could never fail *Penn Central*, because both doctrines would be asking the same question: is it fundamentally fair to hold the former party responsible for the loss? But as both Justice Kennedy and the dissenters were careful to point out, that reasoning has no application to classic *per se* Takings cases, like this one, in which the government "acquires property for itself." 524 U.S. at 542 (Kennedy, J., concurring); *id.* at 554 (Breyer, J., dissenting).

In *per se* cases, Takings jurisprudence diverges considerably from Due Process analysis: the "character" of the government's action is irrelevant. It must pay compensation regardless of the reason for the seizure. The concurring and dissenting opinions in *Eastern Enterprises* did not question that principle. By reading those opinions to hold that the government is free to abrogate its own debts without paying compensation, the Federal Circuit reached a conclusion that no Justice in *Eastern Enterprises* favored, and which conflicts with almost a century of settled law.

III. SPECIFIC, EXISTING MONETARY DEBTS ARE PROPERTY REGARDLESS OF WHETHER THEY RELATE TO A "FUND OF MONEY"

The Federal Circuit also held that an "ordinary obligation to pay money" is not property because it is not a "fund of money." That distinction makes no sense and is inconsistent with settled law.

The Federal Circuit derived this holding from an additional misunderstanding of the concurrence and dissent in *Eastern Enterprises*. Justice Kennedy's concurrence

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534, 552 (6th Cir. 2001); *Ass'n of Bituminous Contractors, Inc. v. Apfel*, 156 F.3d 1246, 1255 (D.C. Cir. 1998).

suggested that the Takings Clause might not apply because the Coal Act did not "target[] a specific property interest [or] depend[] upon any particular property for the operation of its statutory mechanisms." *Eastern Enterprises*, 524 U.S. at 543. The dissent similarly argued that, whereas the property at issue in *Webb's* "arose out of the operation of a specific, separately identifiable fund of money," in *Eastern Enterprises* "there is no specific fund of money; there is only a general liability; and that liability runs not to the Government, but to third parties." *Id.* at 555 (Breyer, J., dissenting).

As noted above, those opinions do not declare a holding of this Court. And neither opinion ultimately reaches any conclusions under the Takings Clause.[22] More importantly, however, both opinions were simply distinguishing the Coal Act—which imposed a new monetary obligation on one private party to benefit another private party in the service of a regulatory objective—from the statutes in *Webb's* and *Phillips*, which seized specific, pre-existing monetary debts for the government's own use. As the rest of their opinions make clear, the critical points for Justice Kennedy and the dissenters were that no pre-existing debt was seized by the Coal Act, and that the government did not take anything for itself. The Federal Circuit nonetheless has reached the untenable conclusion that even confiscating a specific pre-existing debt for the government's own use is not a Taking unless the debt relates somehow to a "fund of money."

That conclusion makes no sense. The statute in this case "target[s] a specific property interest [and] depend[s] upon . . . particular property for the operation of its statutory

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[22] Justice Kennedy ultimately concluded that "we should proceed first to general due process principles, reserving takings analysis for cases where the governmental action is otherwise permissible." *Id.* at 546. Since he concluded the Coal Act failed Due Process, he did not need to reach the Takings issue. Justice Breyer similarly concluded that he "need not face the[] difficulties" associated with whether the Takings Clause applied to laws like the Coal Act, because it would simply duplicate the Due Process analysis in any event. *Id.* at 556.

mechanisms" in exactly the same way as did the statutes in *Webb's* and *Phillips*. The property seized in *Webb's* and *Phillips* was simply a bank's obligation to pay depositors interest attributable to their deposits—or, alternatively, the depositors' claims against the bank for those funds. In other words, an ordinary monetary debt. Even the underlying deposits or accounts were nothing more than debts owed by the bank to its depositors. (Banks of course do not keep deposits physically in separate piles in a vault; they aggregate deposits and loan funds to others.) Yet the Federal Circuit has apparently concluded that while debts owed by banks are property, debts owed by the United States (and presumably ordinary debts owed by other non-banks) are not. That distinction is untenable, serves no coherent constitutional purposes, and clearly is not what either Justices Kennedy or Breyer intended.

The Federal Circuit's test also unjustifiably rewards the United States for being a deadbeat debtor. Presumably if the United States had sent these employees checks for their overtime and then stopped payment, or if it had paid the money owed into court as an appeal bond or interpleader fund (as in *Webb's*) and then passed a statute appropriating that deposit for itself, the Federal Circuit would have acknowledged the existence of a disputed "fund of money." But the only reason petitioners' money remains commingled within the general federal treasury is that the United States has defied its lawful obligations. This Court has never held that a debt must be paid before seizing it can be a Taking. The obligations in *Lynch*, *Perry*, *Webb's*, and *Phillips* had not been paid, or even *adjudicated*.[23] And this Court has recognized that a chose in action (like petitioners' claims for the back wages owed them in this case) is property even if

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[23] Of course, petitioners' entitlement to these wages *has* largely been adjudicated successfully in the COFC. *See infra*, at 4 n.3, 5 and n.6. The Federal Circuit's suggestion that petitioners had only a "bald allegation" that they were owed the money, Pet. App. 17a, is therefore erroneous. In addition, the procedural posture here requires the assumption that petitioners' claims are meritorious and that the money is owed.

not yet reduced to judgment.[24] The point is that, ultimately, this case *does* involve a specific "fund of money"—a fund that the United States is now using for its own benefit, and that has not been reduced to a sum certain only because of the United States' intransigence.[25]

Justice Kennedy and the dissenters in *Eastern Enterprises* faced a difficult conceptual problem. Laws imposing new monetary obligations on private parties, in the service of a regulatory objective, do not fit easily into the regulatory Takings framework because their constitutionality ultimately depends on the fairness of the law rather than its economic impact. But that problem is not presented here. In this case, the government has confiscated its specific, pre-existing monetary debts for its own use. The sole distinction between this case and *Webb's* and *Phillips* is that here the debts were owed by the United States itself. But, as *Lynch* and *Perry* teach, that is a distinction without a difference. The naked self-dealing evident when the United States nullifies its own debts for wages earned makes it even clearer that a compensable *per se* Taking has occurred.[26]

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[24] *See Cities Servs. Co. v. McGrath*, 342 U.S. 330, 335-36 (1952); *Ware v. Hylton*, 3 U.S. 199 (1 Dall.) (1796). Causes of action may in most cases be sold, assigned, pledged as security, or abandoned like any other property, and they are treated as the property of a bankrupt's estate, to be divided among creditors like any ordinary asset. *See, e.g.*, 11 U.S.C. § 541(a)(1); *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 204–05 & n.9 (1983).

[25] As this Court has noted, the FLSA requires employers "to keep proper records of wages, hours and other conditions and practices of employment," and it is employers like the United States "who [are] in [the] position to know and to produce the most probative facts concerning the nature and amount of work performed." *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946). On remand, the COFC may direct the United States to produce "any information or papers" necessary to determine the precise amount owing to petitioners. 28 U.S.C. § 2507(a).

[26] "There is a clear distinction between the power of the Congress to control or interdict the contracts of private parties when they interfere with the exercise of its constitutional authority, and the power of the Congress to alter or repudiate the substance of its own engagements." *Perry*, 294 U.S. at 350-51. In *United States Trust Co. of New York v. New*

IV. ALTERNATIVELY, THIS COURT SHOULD REVERSE ON DUE PROCESS GROUNDS

If this Court agrees with the Federal Circuit that laws of this nature cannot be Takings, it should nevertheless vacate the D.C. Circuit's dismissal of petitioners' Due Process claims. That court erred in applying the lenient rational basis standard to the United States' abrogation of its own debts.[27]

Although various Justices disagreed in *Eastern Enterprises* about whether the case should be analyzed as a Due Process or Takings issue, this Court displayed remarkable unanimity on the substantive standard. The plurality's Takings analysis and the Due Process test articulated by Justice Kennedy and the dissenters all focused on whether the retroactive burdens imposed by the law were fundamentally fair in light of Eastern's past

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Jersey, 431 U.S. 1, 26 (1977), this Court adopted a heightened standard of review under the Contracts Clause when a State impairs its own contracts, because "deference to a legislative assessment of reasonableness and necessity is not appropriate [when] the State's self-interest is at stake." This Court also recognized that *Perry* had "[f]or similar reasons" applied "a dual standard of review . . . under the Fifth Amendment to federal legislation abrogating [the federal government's own] contractual gold clauses." *Id.* at 26 n.25 (citing *Perry*, 294 U.S. at 350–51); *see also United States v. Winstar Corp.*, 518 U.S. 839, 894 n.38 (1996) (plurality op.) (same). Most recently, the *Winstar* plurality suggested that the government has no contract defense of impossibility of performance "where a substantial part of the impact of the Government's action rendering performance impossible falls on its own contractual obligations," 518 U.S. at 898, because such action is "tainted by a governmental object of self-relief...." *Id.* at 896. This Court's frequent recognition that "the Government's self-enrichment may make it all the more evident a taking has occurred" is at one with the consistent jurisprudence described above. *Eastern Enterprises*, 524 U.S. at 544 (Kennedy, J., concurring); *see also id.* at 555 (Breyer, J., dissenting) (distinguishing *Webb's* on the ground "the government took that interest for itself," whereas the liability imposed by the Coal Act "runs not to the Government, but to third parties").

[27] These issues are discussed in greater depth in the separate Due Process petition, but are also included herein as a precaution in case this Court determines that a unified petition was the appropriate course.

relationship to the problem Congress was trying to solve. No Justice believed that the Coal Act could be constitutional merely because it "had a legitimate legislative purpose which was furthered by rational means." Pet. App. 61a. Under that standard, the statute in *Eastern Enterprises* plainly would have been upheld.[28] And Justices Kennedy and Breyer reasoned that Takings review was unnecessary *precisely because* they applied a Due Process test substantially more stringent than rational basis.

Petitioners respectfully submit that if the D.C. Circuit had applied the test articulated by Justice Kennedy and the dissenters in *Eastern Enterprises*, it would have concluded that the 1995 statute violated Due Process. That statute had a severe retroactive effect on petitioners, and they are in no way responsible for the "problems" that the statute was designed to solve. Rational basis review was also inappropriate in this case for two additional reasons. This Court has held that laws retroactively shortening statutes of limitations are *per se* Due Process violations unless they provide a grace period in which claims previously accrued may be filed.[29] This statute did not do so. This Court's precedents also suggest that the deference to legislative judgments implicit in the ordinary rational basis standard is inappropriate when a statute modifies the United States' own proprietary obligations, *supra* at 26 n.26.

V. THIS CASE RAISES ISSUES OF NATIONAL IMPORTANCE

This case presents questions of great national importance. The United States employs nearly four million people on statutory terms, with a total payroll of nearly $200

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[28] Providing health benefits to retirees was certainly a legitimate purpose, and the means chosen (imposing financial liability on former employers), were certainly rational, in the normal sense of a good fit between means and ends. The Coal Act was *unfair*, not *irrational*.

[29] *See, e.g., Ochoa v. Hernandez Y. Morales*, 230 U.S. 139, 161-62 (1913); *Atchafalaya Land Co. v. F.B. Williams Cypress*, 258 U.S. 190, 196-97 (1922); *Block v. North Dakota E. Rel. Bd. of Univ. and School Lands*, 461 U.S. 273, 286 n.23 (1983); *Texaco*, 454 U.S. at 527 n.21.

billion annually.[30] The Federal Circuit held that the United States can retroactively abrogate its obligations to pay wages earned by those employees, for work already performed, without paying just compensation. This case alone involves more than 14,000 federal employees, mostly law enforcement officers, who have been denied back pay that they are entitled to receive. These are contractual debts no less binding on the United States than its Treasury bonds.

The Federal Circuit's arbitrary and formalistic monetary Takings jurisprudence "expand[s] the Government's opportunities for contractual abrogation" and therefore will have the "certain result of undermining the Government's credibility at the bargaining table and increasing the cost of its engagements."[31] More broadly, the Federal Circuit has derived an entirely new jurisprudence of monetary Takings from misunderstood language in recent concurring and dissenting opinions of this Court. That jurisprudence seriously distorts the holdings of at least eight actual decisions of this Court closely on point: *Fisk*, *Lynch*, *Perry*, *Larionoff*, *Webb's*, *Phillips*, *Brown*, and *Eastern Enterprises*. The Federal Circuit made it clear *en banc* in *Commonwealth Edison* that it considers itself bound by its reading of *Eastern Enterprises*, and will not reconsider its doctrine. There is a square and acknowledged

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[30] *See* http://www.dior.whs.mil/mmid/L03/fy03/ATLAS_2003.pdf (last visited February 25, 2005) (military payroll); http://www.opm.gov/feddata/html/2004/september/table4.asp (last visited February 25, 2005) (civilian payroll).

[31] *Winstar*, 518 U.S. at 884 (plurality op.); *see also Lynch*, 292 U.S. at 580 ("Punctilious fulfillment of contractual obligations is essential to the maintenance of the credit of public as well as private debtors."); *Sinking-Fund Cases*, 99 U.S. at 720–21. The potential costs of decreased confidence in the Nation's commitments to pay its debts is staggering; a mere one percent increase in the interest rate that Treasury Bill creditors demand to compensate them for the risk of government default would alone cost the United States $77 billion per year. *See* http://www.publicdebt.treas.gov/opd/opdpenny.htm (last visited February 18, 2005) (enumerating the National debt).

split on the precedential status of *Eastern Enterprises* and, because the Federal Circuit has exclusive jurisdiction over substantial Takings claims against the United States, a split on the merits of the Takings issue is unlikely to develop.[32]

These Takings questions clearly merit this Court's attention, and can be reviewed independently. But petitioners submit that granting review on the Due Process issues as well would aid this Court's consideration of the broader jurisprudential issues. Indeed, the whipsaw that occurred in this case illustrates the critical need for this Court's intervention. The D.C. Circuit, like almost all the lower courts, has concluded that *Eastern Enterprises* contains no holding that could modify the traditional rational basis test under the Due Process Clause. But the Federal Circuit has concluded that *Eastern Enterprises* exempts statutes altering or imposing monetary obligations from any form of Takings scrutiny. The net result is that if the Coal Act were challenged tomorrow it would be subjected to nothing more searching, under either Clause, than Due Process rational basis review. This Court rejected that position *unanimously* in *Eastern Enterprises*.

CONCLUSION

This petition should be granted, or it and the separate petition challenging the Due Process issues should be granted and consolidated for argument.

Respectfully submitted,

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[32] Although cases involving State employee compensation could be litigated in other circuits, those cases would clearly be governed by *Fisk* under the Contracts Clause.

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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

NO. 04-5012

STEPHEN S. ADAMS, AND 14,302 OTHER SIMILARLY-SITUATED PLAINTIFFS,
Plaintiffs-Appellants,

v.

UNITED STATES,
Defendant-Appellee.

FILED December 9, 2004.

Before MICHEL, RADER, and PROST, Circuit Judges.

MICHEL, *Judge:*

Stephen S. Adams and 14,302 other similarly-situated individuals (collectively, "Appellants") were employed between 1984 and 1995 as GS-9, GS-11, GS-12, and GS-13 criminal investigators in various federal law enforcement agencies, including the Bureau of Alcohol Tobacco and Firearms ("BATF"), the Drug Enforcement Agency ("DEA"), the Internal Revenue Service ("IRS"), the United States Customs Service ("Customs Service"), and the United States Secret Service ("USSS").[1] They appeal from the order of the United States Court of Federal Claims granting the Government's motion to dismiss their takings complaint for failure to state a claim upon which relief may be granted. *Adams v. United States*, No. 00-447C, 2003 U.S. Claims LEXIS 238 (Fed. Cl. Aug.11, 2003). Appellants

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[1] Several of those agencies or units thereof have since been renamed and/or merged into the United States Department of Homeland Security. *See* Homeland Security Act of 2002, Pub.L. No. 107-296 § 1502, 2002 U.S.C.C.A.N. (116 Stat. 2135, 2308 (2002)).

received overtime compensation, apparently pursuant to the Federal Employees Pay Act ("FEPA"), codified at 5 U.S.C. § 5542, at a rate less than one-and-one-half times their regular rate of pay.[2] Appellants assert entitlement to overtime compensation at the rate specified under the Fair Labor Standards Act ("FLSA"), codified at 29 U.S.C. §§ 201-219, which is at least one-and-one-half times their regular rate of pay, rather than at the lower rate provided for in the FEPA. In other words, Appellants seek to recover as damages the difference between what they received under the FEPA versus the amount they would have received under the FLSA ("underpaid overtime compensation"). The case was submitted for decision after oral argument on September 7, 2004. Because Appellants do not have a cognizable property interest in either the underpaid overtime compensation or in an administrative claim thereto within the meaning of the Takings Clause of the Fifth Amendment, we affirm.

I. BACKGROUND

A. Statute of Limitations Applicable to FLSA Claims

The FLSA provides overtime compensation to certain employees who work more than forty hours per week at a rate not less than one-and-one-half times the employees' regular rate of compensation. This statute originally did not cover federal employees. In 1974, however, Congress extended it to federal employees, but exempted those classified as executive, administrative, or professional. *Id.* § 213(a)(1).

To recover unpaid overtime compensation under the FLSA, a federal employee may file either an action at law or

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[2] The parties fail to analyze the specific provision under which Appellants received compensation for overtime work. Nevertheless, the Government cited the FEPA in its brief, a citation that was not contradicted in Appellants' reply brief.

a claim before the General Accounting Office ("GAO"). Actions at law brought under the FLSA are subject to the statute of limitations provided in the Portal-to-Portal Pay Act, codified at 29 U.S.C. §§ 251-262, which provides for a two-year limitations period for cases in which the FLSA violation is non-willful and a three-year period where the violation is willful. *Id.* § 255(a).

The statute of limitations for administrative claims before the GAO initially was selected, then revised by, the Comptroller General of the United States and twice altered by Congress. The numerous changes in the statute of limitations for claims before the GAO, in part, create the backdrop of the instant takings claim. Therefore, it is important to have a general understanding of the evolution of the limitations periods involved.

In 1978, the Comptroller General ruled that the statute of limitations for FLSA claims before the GAO was not the statutory period specific to FLSA claims, but was six years as set forth in the more generally applicable Barring Act, codified at 31 U.S.C. § 3702(b). *In re Transp. Sys. Ctr.*, 57 Comp.Gen. 441 (1978). Sixteen years later, on May 24, 1994, the Comptroller General effectively changed the statute of limitations for FLSA claims before the GAO from six years to two years for non-willful violations and three years for willful violations, essentially recognizing as applicable the limitations period specifically set for FLSA claims in the Portal-to-Portal Pay Act. *In re Ford*, 73 Comp.Gen. 157 (1994).

Shortly thereafter, on September 30, 1994, Congress enacted the Treasury, Postal Service and General Government Appropriations Act of 1995, Pub.L. No. 103-329, 108 Stat. 2383, 2432 (1994). Section 640 of that act mandated that the Comptroller General apply a six-year statute of limitations period to any administrative claim under the FLSA filed prior to June 30, 1994, and a two-year

statute of limitations period to any such claim filed after June 30, 1994.

On November 19, 1995, Congress enacted the Treasury, Postal Service, and General Government Appropriations Act of 1996, Pub.L. No. 104-52, 109 Stat. 468, 468-69 (1995), which amended Section 640 to further limit the types of FLSA claims that may be decided by the GAO ("amended Section 640"). Amended Section 640 precluded, among other changes, application of the six-year statute of limitations originally set forth in Section 640 to employees who had received overtime compensation under another provision of law. Thus, those employees were limited to the two-year statute of limitations period.

B. Appellants' Status Under the FLSA

Pursuant to 5 C.F.R. § 551.201, the BATF, the DEA, the IRS, the Customs Service, and the USSS independently determined, as the respective employing agencies, that Appellants were administrative employees exempt from the FLSA and its overtime provisions. In making this determination, the employing agencies evaluated whether Appellants' duties met the administrative exemption criteria set forth in 5 C.F.R. § 551.206. Significantly, Appellants were presumed to be non-exempt under the civil service regulations, thereby requiring the employing agencies to carry the burden of establishing that the Appellants met the criteria of § 551.206. *Id.* §§ 551.202(a), (c).

Dissatisfied with this exemption determination, Appellants filed an action at law under the Tucker Act, codified at 28 U.S.C. § 1491, against the Government in the United States Court of Federal Claims. Simultaneously, Appellants filed identical administrative claims before the GAO. In both proceedings, Appellants alleged that they were improperly ruled exempt from the FLSA and were entitled to damages flowing from this misclassification. In a

decision dated October 30, 1992, the Court of Federal Claims concluded that some of the Appellants were exempt, while others were non-exempt. *Adams v. United States*, 27 Fed.Cl. 5, 28-29 (1992).

On September 23, 1998, we partially reversed the Court of Federal Claims' ruling in a non-precedential opinion and remanded the case for further proceedings as to those criminal investigators held exempted from the FLSA. *Adams v. United States*, No. 98-5011, 1998 WL 804552, 1998 U.S.App. LEXIS 23565 (Fed.Cir. Sept. 23, 1998) (Table). That case remains pending before the Court of Federal Claims.

C. Prior Court Proceedings Leading to the Instant Appeal

On October 27, 1995, prior to the enactment of amended Section 640, Appellants filed suit against the Government in the United States District Court for the District of Columbia, seeking mandamus, injunctive, and declaratory relief against the GAO for its inactivity on their administrative claims. Following the enactment of amended Section 640, Appellants twice supplemented their complaint to challenge the constitutionality of original Section 640 and amended Section 640 under the Due Process and Takings Clauses of the Fifth Amendment.

On October 12, 1996, the district court granted summary judgment in favor of the Government. *Adams v. Bowsher*, 946 F.Supp. 37 (D.D.C.1996). The district court addressed Appellants' due process arguments, ultimately concluding that neither Section 640 nor amended Section 640 violated the Due Process Clause. As to Appellants' takings claim, the district court concluded that a compensable taking did not occur, based upon the three factors set forth for regulatory takings in *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224-25, 106 S.Ct. 1018, 89 L.Ed..2d 166 (1986). *Adams*, 946 F.Supp. at 44. Appellants appealed that

decision to the United States Court of Appeals for the District of Columbia Circuit.

On August 28, 1998, the District of Columbia Circuit affirmed the district court's decision on the due process claim, but reversed its decision on Appellants' takings claim. *Adams v. Hinchman*, 154 F.3d 420 (D.C.Cir.1998). The circuit court noted that takings claims for amounts greater than $ 10,000 fall within the exclusive jurisdiction of the Court of Federal Claims pursuant to the Tucker Act. *Id.* at 425-426. Consequently, the circuit court concluded that the district court might lack jurisdiction to entertain Appellants' takings claim and remanded the takings claim to the district court to determine whether jurisdiction was proper under the Little Tucker Act, codified at 28 U.S.C. § 1346(a)(2), for claims of less than $10,000, which lodges concurrent jurisdiction in the district courts.

On March 30, 2000, the district court issued an opinion answering the jurisdictional question posed by the circuit court. *Adams v. Walker*, No. 95-2015 (D.D.C. Mar.30, 2000). The district court noted that Appellants sought to amend their complaint to allege an amount in controversy in excess of $10,000. The district court stated that the circuit court "essentially rejected [Appellants'] claim for injunctive relief and viewed it instead as a claim for money damages." *Id.*, slip. op. at 5. Hence, the district court concluded that justice required it to allow Appellants to amend their complaint and, therefore, to transfer the case to the Court of Federal Claims. *Id.*, slip. op. at 6. The district court thus vacated its ruling concerning Appellants' takings claim and ordered the case transferred to the Court of Federal Claims pursuant to the transfer provision in 29 U.S.C. § 1631. *Id.*, slip. op. at 9.

D. The Court of Federal Claims Decision

On August 4, 2000, after transfer from the district court to the Court of Federal Claims, Appellants' complaint claimed that three separate governmental actions effected a

taking of their property under the Fifth Amendment: (1) the Comptroller General's *Ford* decision that retroactively applied a two- or three-year statute of limitations to their administrative claims instead of the six-year statute of limitations; (2) the GAO's failure and refusal in the intervening year to apply the original Section 640 to their administrative claims; and (3) Congress's amendment of Section 640 in late 1995 restricting restoration of the six-year limitations period to situations where no overtime was paid at all. In response, the Government asserted that Appellants' case is merely a standard FLSA entitlement case disguised as a Fifth Amendment takings claim. Put differently, the Government argued that Appellants' claim is one for statutory entitlement under the FLSA because the only property allegedly taken was FLSA overtime compensation. The Government also argued that a claim to FLSA overtime compensation is not "property" within the meaning of the Takings Clause, and subsequently moved to dismiss the complaint under Court of Federal Claims Rule 12(b)(6) for failure to state a claim upon which relief can be granted and Court of Federal Claims Rule 12(b)(1) for lack of jurisdiction over the subject matter of the case.

The trial court distilled the parties' arguments to a single issue: whether Appellants' claim involves "property" within the meaning of the Takings Clause of the Fifth Amendment. *Adams*, 2003 U.S. Claims LEXIS 238 at *20. To address that issue, the trial court considered Appellants' claim for underpaid overtime compensation separate from Appellants' administrative claim. Relying on *Commonwealth Edison Co. v. United States*, 271 F.3d 1327 (Fed.Cir. 2001) (en banc), the trial court held that a governmental obligation to pay money pursuant to a statute is not a protected "property" interest under the Takings Clause. *Adams*, 2003 U.S. Claims LEXIS 238 at *20. In reaching that holding, the trial court focused its analysis on the identification of a true property interest but concluded

that "[a]ll the [appellants] have identified is a run-of-the-mill claim for liability." *Id.* at *27. Additionally, the court reasoned that even if a statutory right to payment could be considered "property," the Government had not "taken" Appellants' money for its own use; it simply did not pay them because it determined after analysis that they were exempt from the FLSA. *Id.* at *30.

As for Appellants' administrative claim, the court observed that the abolition of a cause of action may rise to the level of a taking, but only if the cause of action secures a "legally protected interest." *Id.* at *40. For that reason, the court concluded that Appellants' administrative claim also must fail, since the interest underlying this claim is not cognizable as a property right protected by the Takings Clause of the Fifth Amendment. *Id.* Moreover, the court noted that the district court and District of Columbia Circuit already had rejected Appellants' due process claims. *Id.* The court concluded, therefore, that no cause of action to protect Appellants' property or procedural rights had been unconstitutionally taken from them. *Id.* at *41. Accordingly, the Court of Federal Claims granted the Government's motion to dismiss and ordered entry of final judgment in favor of the Government.

Appellants timely appealed, arguing that the Court of Federal Claims erred in deciding that they did not have a property interest in either FLSA overtime compensation, or an administrative claim thereto, cognizable under the Takings Clause. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(3) because the appeal is from a final judgment of the Court of Federal Claims.

II. DISCUSSION

A. Standard of Review

The Court of Federal Claims did not explicitly state whether the motion to dismiss was granted under Rule 12(b)(1) or under Rule 12(b)(6) of the Rules of the Court of

Federal Claims. Nevertheless, it appears that the Government did not present an exclusively jurisdictional argument, which would invoke Rule 12(b)(1). Additionally, the Court of Federal Claims focused on the merits of Appellants' case in its opinion. Therefore, the Court of Federal Claims can best be described as having granted the motion to dismiss under Rule 12(b)(6) of the Court of Federal Claims for failure to state a claim on which relief can be granted.[3]

Dismissal for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure is proper only when a plaintiff "'can prove no set of facts in support of his claim which would entitle him to relief.'" *Leider v. United States*, 301 F.3d 1290, 1295 (Fed.Cir.2002) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed..2d 80 (1957)). In reviewing the Court of Federal Claims' grant of a Rule 12(b)(6) motion, we must assume that all well-pled factual allegations in the complaint are true and draw all reasonable inferences in favor of the non-movant. *See Leider*, 301 F.3d at 1295. Whether the Court of Federal Claims properly dismissed Appellants' complaint for failure to state a claim upon which relief can be granted is a question of law which we review *de novo*. *See id.* (citing *Boyle v. United States*, 200 F.3d 1369, 1372 (Fed.Cir.2000)).

B. The Takings Clause

The Takings Clause of the Fifth Amendment provides, in pertinent part: "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V, cl. 4. A claimant under the Takings Clause must show that the government, by some specific action, took a private property interest for a public use without just compensation. *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 294, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981).

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[3] Rule 12 of the Court of Federal Claims mirrors Rule 12 of the Federal Rules of Civil Procedure.

In evaluating a takings claim, we have developed a two-step approach. First, we determine whether the claimant possessed a cognizable property interest in the subject of the alleged taking for purposes of the Fifth Amendment, *i.e.*, whether the claimant possessed a "stick in the bundle of property rights." *Karuk Tribe of Cal. v. Ammon*, 209 F.3d 1366, 1374 (Fed.Cir.2000) (internal citation omitted). Second, once we have determined that such a property interest exists, we decide "whether the governmental action at issue constituted a taking of that 'stick.'" *Id.* (citing *M & J Coal Co. v. United States*, 47 F.3d 1148, 1154 (Fed.Cir.1995)).

In this case, our analysis focuses on the threshold requirement of a recognized property interest, *i.e.*, whether Appellants possessed any cognizable property interests within the meaning of the Takings Clause in either FLSA overtime compensation or in an administrative claim thereto. The Constitution itself neither creates nor defines the property interests that if taken by the government are compensable under the Fifth Amendment. *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed..2d 548 (1972). Rather, "existing rules or understandings that stem from an independent source," such as state, federal, or common law, create and define the dimensions of property interests for purposes of establishing a cognizable right and hence a potential taking. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030, 112 S.Ct. 2886, 120 L.Ed..2d 798 (1992). We have observed:

> Property interests are about as diverse as the human mind can conceive. Property interests may be real and personal, tangible and intangible, possessory and nonpossessory. They can be defined in terms of sequential rights to possession (present interests—life estates and various types of fees—and future interests), and in terms of shared interests (such as those of a mortgagee, lessee, bailee, adverse possessor), and there

> are interests in special kinds of things (such as water, and commercial contracts). And property interests play across the entire range of legal ideas.

Fla. Rock Indus., Inc. v. United States, 18 F.3d 1560, 1572 n. 32 (Fed.Cir.1994). In light of the complex nature of property interests and associated rights, we must identify the precise nature of Appellants' takings claim on appeal. Appellants argue, as they did before the Court of Federal Claims, that two specific property interests are implicated, namely, an interest in payment of underpaid overtime compensation according to FLSA rates and an interest in an administrative claim thereto before the GAO. We consider each of these alleged property interests in turn.

i. Do Appellants Possess a Cognizable Property Interest in Their Asserted Right to Underpaid Overtime Compensation According to FLSA Rates?

Appellants argue that as of November 18, 1995, they possessed a valid claim against the Government for six years of underpaid overtime compensation. Appellants contend that when Congress amended Section 640 on November 19, 1995, reducing the limitations period for certain claims from six to two years, the Government confiscated via a *per se* taking four years of their claim for underpaid overtime compensation under the FLSA without just compensation.

Appellants assert that vested property rights may be created by either statute or contract, proceeding on both theories in the alternative. Focusing first on statutory grounds, Appellants contend that they acquired property rights in underpaid overtime compensation under the FLSA for six previous years because such rights vested at the end of each pay period during which they worked hours of overtime, and the statute of limitations was six years. Appellants assert that the Government was obligated as a

matter of law to pay them for these overtime hours at the FLSA rate (*i.e.*, at least one-and-one-half times their regular rate), not at any lesser rate under the FEPA or any other statute. As examples of cases that recognize property interests and derivative rights created by statute, Appellants cite *United States v. Larionoff*, 431 U.S. 864, 97 S.Ct. 2150, 53 L.Ed..2d 48 (1977), *Zucker v. United States*, 758 F.2d 637 (Fed.Cir.1985), and *Kizas v. Webster*, 707 F.2d 524 (D.C.Cir.1983).

We disagree that Appellants own any Fifth Amendment property interest pursuant to the FLSA statute. Appellants confuse a property right cognizable under the Takings Clause of the Fifth Amendment with a due process right to payment of a monetary entitlement under a compensation statute.[4] *Larionoff*, *Zucker*, and *Kizas* are inapposite because each involves enforcing a statutory entitlement to compensation for employment, not recognizing the predicate for a takings claim. In *Larionoff*, the Supreme Court considered a soldier's entitlement to a reenlistment bonus under the statutory Variable Reenlistment Bonus Program. 431 U.S. at 866, 97 S.Ct. 2150. Similarly, in *Zucker*, we decided civil servant retirees' entitlement to cost-of-living-adjustments under the Civil Service Retirement Act, while in *Kizas*, the United States Court of Appeals for the District of Columbia Circuit addressed FBI agents' entitlement to a "special preference" as an element of compensation under Title 5 of the United States Code. *Zucker*, 758 F.2d at 639-40; *Kizas*, 707 F.2d at 534-38.

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[4] Generally, entitlements are considered to be government conferred benefits, safeguarded exclusively by procedural due process. See *Bd. of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). In light of this, entitlements are often referred to as "property interests" within the meaning of the Due Process Clause in cases decided under that clause, but such references have no relevance to whether they are "property" under the Takings Clause.

Appellants alternatively contend that the assertedly applicable FLSA rate of overtime compensation became a contractual right once the work was completed. Appellants rely on a passage from *Fisk v. Jefferson Police Jury*, 116 U.S. 131, 6 S.Ct. 329, 29 L.Ed.. 587 (1885), to support that contention: "But after the services have been rendered, under a law, resolution, or ordinance which fixes the rate of compensation, there arises an implied contract to pay for the services at that rate. This contract is a completed contract." *Id.* at 133-34, 6 S.Ct. 329. Pursuing a contract theory, Appellants contend that they acquired vested property rights to the underpaid overtime compensation via an implied contract with the Government formed when they completed the overtime work. For support, Appellants cite to selected cases, such as *Lynch v. United States*, 292 U.S. 571, 54 S.Ct. 840, 78 L.Ed. 1434 (1934), wherein courts have found that sometimes rights arising out of a contract can be protected by the Takings Clause of the Fifth Amendment.

Appellants' contract theory is without merit. At the outset, Appellants mischaracterize *Fisk*. The plaintiff in *Fisk* served as a Louisiana parish district attorney by appointment, and a municipal law fixed his salary. When the Parish of Jefferson failed to pay his salary for four years, plaintiff sued in state court for recovery, requesting a writ of mandamus to compel the parish to assess and collect a tax for the payment of his salary. The Supreme Court of Louisiana denied the writ based upon a provision of the Louisiana Constitution limiting the power to levy a tax. The plaintiff sought review in the United States Supreme Court, arguing that the Louisiana constitutional provision impaired the obligation of his contract as guaranteed by the Contract Clause of the United States Constitution. *Fisk*, 116 U.S. at 133, 6 S.Ct. 329. The United States Supreme Court agreed, concluding that:

> [the plaintiff's] appointment as district attorney was lawful and was a request made to him by the proper

> authority to render the services demanded of that office. He did render these services for the parish, and the obligation of the police jury to pay for them was complete. Not only were the services requested and rendered, and the obligation to pay for them perfect, but the measure of compensation was also fixed by the previous order of the police jury. There was here wanting no element of a contract.

Id. at 134, 6 S.Ct. 329. Thus, *Fisk* involved an unconstitutional provision of state law and was decided under the Contracts Clause, not the Takings Clause.

Appellants cite no case law to show that either the United States Supreme Court or this court would view a takings claim against the United States in the same light. Like all federal employees, Appellants served by appointment. The terms of their employment and compensation, consequently, were governed exclusively by statute, not contract. They had not, and could not have, entered into any separate agreement with the Government, express or implied, for additional overtime compensation beyond that to which they were entitled by the applicable statute. Hence, contrary to Appellants' characterization of their entitlement to underpaid overtime compensation as based on an implied contract, Appellants had nothing more than a unilateral expectation to receive FLSA, rather than FEPA, overtime compensation for their hours of overtime work. Indeed, the District of Columbia Circuit previously recognized that

> federal workers serve by appointment, and their rights are therefore a matter of legal status even where compacts are made. In other words, their entitlement to pay and other benefits must be determined by reference to the statutes and regulations governing [compensation], rather than to ordinary contract principles. Though a distinction between appointment

> and contract may sound dissonant in a regime accustomed to the principle that the employment relationship has its ultimate basis in contract, the distinction nevertheless prevails in government service. Applying these doctrines, courts have consistently refused to give effect to government-fostered expectations that, had they arisen in the private sector, might well have formed the basis for a contract or an estoppel. These cases have involved, *inter alia*, promises of appointment to a particular grade or step level, promises of promotion upon satisfaction of certain conditions, promises of extra compensation in exchange for extra services, and promises of other employment benefits.

Kizas, 707 F.2d at 535 (citations and internal quotations omitted).

Furthermore, Appellants' reliance on *Lynch* is misplaced. In *Lynch*, despite the government having duly issued the insured a lawful insurance policy, Congress abrogated by legislation all such policies in force. Here, unlike in *Lynch*, the Government did not enter into any private agreement with Appellants regarding the terms or rates of Appellants' overtime compensation, and Congress did not abrogate any such contract. The Government, in fact, could not have contracted to pay Appellants for overtime work at a rate of at least one-and-one-half their regular rate of pay because, like all government employees, Appellants' compensation is governed exclusively by statute. Consequently, as previously stated, Appellants cannot be contractually entitled to overtime compensation at the rate specified under the FLSA or any other pay statute. When the Government and private parties contract, as in *Lynch*, the private party usually acquires an intangible property interest within the meaning of the Takings Clause in the contract. The express rights under this contract are just as concrete as the inherent rights

arising from ownership of real property, personal property, or an actual sum of money. Here, no contract established in Appellants a property interest in overtime compensation at a particular rate under the FLSA. Because Appellants cannot show that they had a contract with the Government, they are not entitled to Takings Clause protection under *Lynch*.

Extending its contract theory, Appellants particularly equate the Government's alleged statutory obligation to pay them overtime compensation at the FLSA rate with a debt owed by a debtor to a lender. They use the word "debt" repeatedly, but they distort the meaning of this word. That is, Appellants claim that when they performed the overtime work, the Government incurred a debt commensurate with paying them for their labor at the FLSA rate, not a lesser rate under an alternative overtime pay statute. Appellants contend, in turn, that paying this "debt" is akin to paying the insurance policy proceeds in *Lynch* or the gold standard bonds in *Perry v. United States*, 294 U.S. 330, 55 S.Ct. 432, 79 L.Ed. 912 (1935).

Appellants' argument is wholly unpersuasive. In *Lynch*, an insured purchased a war insurance policy from the United States, effectively lending money to the Government in exchange for future payment on the value of the policy at the time of the insured's death. 292 U.S. at 574-75, 54 S.Ct. 840. Likewise, in *Perry*, the bond owner purchased a gold bond from the United States, also in effect lending money to the Government in exchange for payment of the principal amount of the bond plus interest in gold coins. 294 U.S. at 346-47, 55 S.Ct. 432. In both cases, the Government agreed with the lenders, *i.e.*, the insured and the bond owner, to make future payment of either the policy amount in the case of a war insurance policy or the bond principal plus interest in the case of the gold bond in exchange for the immediate use of their money. Also, the Government's "debt" to the insured and the bond owner was evidenced in a legal

instrument issued by the Government to acknowledge and create the debt, respectively an insurance policy and a bond certificate. Here, as stated above, the Government and Appellants did not, and could not have, agreed that the Appellants would "loan" their underpaid overtime compensation to the Government in exchange for a "debt" owed by the Government to them. Additionally, the Government issued no underlying legal instrument evidencing the Government's agreement to a loan. The only legal instrument, the Form 50, rather than acknowledging Appellants' right to be paid for overtime at the rate specified in the FLSA, instead indicated that the FLSA did not apply to them. Thus, Appellants are not in the same position as the insured and bond holder in *Lynch* and *Perry*, but instead are in the opposite position. Accordingly, as the Government argues, Appellants are not owed a debt; they have nothing more than a bald allegation that they are owed underpaid overtime compensation by the Government.

Lastly, Appellants argue that the Court of Federal Claims misunderstood and misapplied our *Commonwealth Edison* decision. Appellants assert that this court in *Commonwealth Edison* did not intend to suggest by using the phrase "specific fund of money"[5] that the Takings Clause applies only when a particular sum or account is at stake. Rather, Appellants contend that this court used the phrase merely to distinguish between an obligation imposed by the Government to pay money to achieve a regulatory objective, as in that case, and confiscation of specific money

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5 The phrase "fund of money" as used in *Commonwealth Edison* derives from Justice Breyer's dissent in *Eastern Enterprises v. Apfel*, 524 U.S. 498, 118 S.Ct. 2131, 141 L.Ed.2d 451 (1998). Justice Breyer stated: "But the monetary interest at issue there [referring to *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 101 S.Ct. 446, 66 L.Ed.2d 358 (1980)] arose out of the operation of a *specific, separately identifiable fund of money*." *E. Enters.*, 524 U.S. at 555, 118 S.Ct. 2131 (emphasis added).

by the Government, as in a classic *per se* taking, which Appellants argue occurred here.

New England Legal Foundation ("NELF"), as amicus curiae,[6] advances a similar argument, going so far as to assert that the alleged underpaid overtime compensation is a "fund of money." NELF reaches this position by advocating that "[t]he key to a 'fund of money' is that it must be 'specific' and 'separately identifiable,' not that it be kept in a separate account." In other words, NELF appears to claim that as long as the money allegedly owed is both "specific" and "separately identifiable," then it qualifies as a protected "fund of money." NELF contends that Appellants theoretically could calculate the amount of underpaid overtime compensation by multiplying the total number of overtime hours by the applicable overtime rate under the FLSA. Accordingly, NELF asserts that the amount of underpaid overtime compensation due to Appellants is both "specific" and "separately identifiable," even if it is not maintained in a separate account by the Government.

The Government seeks to refute Appellants' and NELF's positions, arguing that the Court of Federal Claims was correct that an ordinary statutory obligation to pay money can never constitute property for purposes of the Takings Clause. The Government asserts that Appellants and NELF plainly ignore the holding in *Commonwealth Edison* and attempt to distinguish that case based on differences between the facts there and those here that are immaterial. Additionally, the Government claims that NELF fails to explain how the alleged underpaid overtime compensation is any more a "fund of money" than the

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[6] The Federal Law Enforcement Officers' Association ("FLEOA") also presented an amicus curiae brief in support of Appellants' position. However, the FLEOA did not address the substance of a takings analysis, but instead focused primarily on the unfairness of not granting Appellants' relief.

obligation to pay money in *Commonwealth Edison*. Indeed, the Government further contends the allegedly underpaid overtime compensation here is even less a "specific" and "separately identifiable" fund than the monetary obligation in *Commonwealth Edison*.

Like the Government, we do not read *Commonwealth Edison* in the same light as either Appellants or NELF. In *Commonwealth Edison*, Congress imposed a monetary assessment in the Energy Policy Act of 1992, Pub.L. No. 102-486, 106 Stat. 2776 (codified as amended in various sections of 42 U.S.C.), on all domestic utilities such as Commonwealth Edison that used uranium re-processing facilities operated on their behalf by the United States Department of Energy. Under the Energy Policy Act, the Government was to use the revenue generated by the assessment to fund part of the cost of environmental remediation of its contaminated re-processing facilities. We held that Congress did not effect a taking within the meaning of the Fifth Amendment by imposing a statutory obligation to pay money on the utility companies. *Commonwealth Edison*, 271 F.3d at 1340. In reaching this conclusion, we followed the views of a majority[7] of the justices of the Supreme Court in *Eastern Enterprises*. *Id.* at 1338. In that case, the Supreme Court addressed the constitutionality of the Coal Industry Retiree Health Benefit Act of 1992, codified at 26 U.S.C. §§ 9701-9722 (the "Coal Act").

The Coal Act required certain coal mine operators to fund future health benefits of former coal mine employees of defunct companies, even though the paying, extant companies never employed them. Writing for the plurality,

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[7] Notably, there was not a majority opinion of the Supreme Court in *Eastern Enterprises*. By referring to "a majority" view herein, we mean those views expressed in the concurring opinion of Justice Kennedy together with those expressed in the dissenting opinion of Justices Stevens, Souter, Ginsburg, and Breyer.

Justice O'Connor, joined by Chief Justice Rehnquist and Justices Scalia and Thomas, concluded that the retroactive impact of the Coal Act as applied to Eastern Enterprises was an unconstitutional taking because it placed a "severe, disproportionate and extremely retroactive burden" on the extant coal operators. *E. Enters.*, 524 U.S. at 538, 118 S.Ct. 2131. While concurring in the result, Justice Kennedy disagreed with the plurality's conclusion that an obligation to pay money can support a taking, because:

> [the Coal Act] does not operate upon or alter an identified property interest, and it is not applicable to or measured by a property interest. The Coal Act does not appropriate, transfer, or encumber an estate in land (*e.g.*, a lien on a particular piece of property), a valuable interest in an intangible (*e.g.*, intellectual property), or even a bank account or accrued interest. The law simply imposes an obligation to perform an act, the payment of benefits.

Id. at 540, 118 S.Ct. 2131. Indeed, the four dissenters, namely, Justices Stevens, Souter, Ginsburg, and Breyer, specifically "agreed that the Takings Clause was not implicated because 'the private property upon which the [Takings] Clause traditionally has focused is a specific interest in physical or intellectual property .... This case involves not an interest in physical or intellectual property, but an ordinary liability to pay money.'" *Id.* at 554, 118 S.Ct. 2131. We thus held in *Commonwealth Edison* that "the mere imposition of an obligation to pay money, as here, does not give rise to a claim under the Takings Clause of the Fifth Amendment." *Commonwealth Edison*, 271 F.3d at 1340. Given the precise language found in Justice Kennedy's concurrence and the dissent, we premised our holding in *Commonwealth Edison* not on whether the statutory obligation was imposed for purposes of regulation or confiscation as suggested by Appellants, but rather on the nature of the interest in dispute (*i.e.*, a legally-

recognized property interest such as one in real estate, personal property, or intellectual property, versus an ordinary obligation to pay money). The former is protected as property under the Takings Clause, whereas the latter is not because it lacks any foundation in property law.

We also took care in *Commonwealth Edison* to distinguish the specific funds implicated in *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 118 S.Ct. 1925, 141 L.Ed.2d 174 (1998), and *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 101 S.Ct. 446, 66 L.Ed.2d 358 (1980), as legitimate property interests from statutory obligations to pay money. 271 F.3d at 1338. Particularly, we noted that each contributor's share of interest income generated by funds held in a specific, consolidated Interest on Lawyers Trust Account, commonly known as an IOLTA account, is the private property of that contributor for purposes of the Takings Clause. *See Phillips*, 524 U.S. at 160, 118 S.Ct. 1925. Similarly, we observed that each contributor's share of interest generated from deposits into a specific, consolidated interpleader account is a property interest of that contributor within the meaning of the Takings Clause. *See Webb's Fabulous Pharmacies*, 449 U.S. at 164-65, 101 S.Ct. 446. In light of our use of the term "specific" to mean an actual sum of money representing interest derived from ownership of particular deposits in an established account, as opposed to some abstract sum of money capable of being calculated, NELF's argument cannot stand.

While it may be debatable to what extent the precise holding in *Commonwealth Edison* controls the instant case, this decision certainly provides the principle for determining how to treat the instant claim of a statutory entitlement to money under the Takings Clause. Both the Government and the Court of Federal Claims correctly noted that *Commonwealth Edison* clearly suggests that no statutory obligation to pay money, even where unchallenged, can

create a property interest within the meaning of the Takings Clause. Here, in Appellants' claim that the Government is obligated to pay underpaid overtime compensation under the FLSA, we are faced with a statutory obligation to pay money, just as was implicated in *Commonwealth Edison*. Hence, based upon the principle of *Commonwealth Edison*, Appellants do not possess a property interest under the Takings Clause.

What is more, we conclude that a statutory right to be paid money, at least in the context of federal employee compensation and benefit entitlement statutes, is not a property interest for purposes of the Takings Clause. Appellants have neither cited, nor are we independently aware of, any appellate court decision recognizing a statutory obligation to be paid money as a property interest grounded in property law. We decline to treat a statutory right to be paid money as a legally-recognized property interest, as we would real property, physical property, or intellectual property. Instead, we view it as nothing more than an allegation that money is owed. We thus conclude that Appellants cannot prove any set of facts that could support granting their requested relief.

ii. Do Appellants Possess a Cognizable Property Interest in an Administrative Claim to Underpaid Overtime Compensation Before the GAO?

Appellants argue, but only in a cursory fashion, that as of November 18, 1995, they owned a valid administrative claim before the GAO to recover their unpaid overtime compensation.[8] They contend that when Congress amended Section 640 on November 19, 1995, the Government entirely

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[8] Appellants devoted little attention to this issue, discussing it only in a handful of paragraphs in their opening and reply briefs. Consequently, we view it as a secondary argument and treat it accordingly in this opinion.

extinguished their administrative claim to underpaid overtime compensation, effecting a *per se* taking of their private property without just compensation. Appellants rely on *Alliance of Descendants of Texas Land Grants v. United States*, 37 F.3d 1478 (Fed.Cir.1984), to support their argument that their GAO claim, like certain causes of action, is "property" within the meaning of the Takings Clause. What is more, Appellants maintain that it was immaterial that their claim had not yet been decided by the GAO when Section 640 was amended.

Although we agree with Appellants that sometimes a cause of action may fall within the definition of property recognized under the Takings Clause, we observe, like the Court of Federal Claims, that precedent has limited the application of the Takings Clause to cases in which the cause of action protects a legally-recognized property interest. *See, e.g., Cities Serv. Co. v. McGrath*, 342 U.S. 330, 72 S.Ct. 334, 96 L.Ed.359 (1952) (holding that seizure by Alien Property Custodian of interest represented by bond or debenture without seizure of instrument itself is unconstitutional taking of obligor's property unless he is assured that he has claim against United States for recoupment in the event of subsequent recovery against him in foreign court by holder in due course of debenture). Such is not the case here because, as discussed in detail above, the underlying subject matter of Appellants' alleged administrative claim fails to qualify as a recognized property interest under the Takings Clause. Appellants' reliance on *Alliance of Descendants* is utterly misplaced because the cause of action there was to recover compensation for an interest in land, a property interest cognizable under established takings jurisprudence because land is, beyond question, property under state and common law. *Alliance of Descendants*, 37 F.3d at 1481. Appellants have not cited any precedent finding such a property interest in a claim of Government liability before an administrative agency.

Hence, we conclude that Appellants do not possess a cognizable property interest in any part of their administrative claim before the GAO.

iii. *Per Se* Takings Argument

Because we agree with the Court of Federal Claims that Appellants do not possess any cognizable property interest within the meaning of the Takings Clause, we necessarily hold that the Government could not commit a *per se* taking without just compensation any more than it could commit a regulatory or any other kind of taking.

III. CONCLUSION

The order of the Court of Federal Claims granting the Government's motion to dismiss and the resulting judgment for the Government are

AFFIRMED.

IN THE UNITED STATES COURT
OF FEDERAL CLAIMS

No. 00-447 C.
(Filed: August 11, 2003)

STEPHEN S. ADAMS, *et al.*,

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

OPINION AND ORDER

Block, *Judge*:

To James Madison, rightly termed the Father of the Constitution, "that alone is a *just* government which impartially secures to every man whatever is his *own*."[9] What must be secured by government is personal security and private property, the protection of which was considered by the Founders of our Republic to be the centerpiece of civil society and the source of all other liberties. Although originally opposed to a Bill of Rights, it was Mr. Madison who ultimately penned and fought for its ratification. The Fifth Amendment to our Constitution was in part adopted to protect private property from arbitrary governmental action.

Two clauses of this amendment are pertinent in this case. First, the Due Process Clause, which protects, "life, liberty, or property" from being seized without "due process of law." Second, the Takings Clause, which proscribes the

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[9] James Madison, *Essay on Property*, reprinted in Kurland, *The Founders' Constitution*, Vol. 1, Ch. 16 Document 23, University of Chicago Press (1987) (emphasis original).

taking of private property "for public use" without "just compensation." The District Court for the District of Columbia and the D.C. Circuit have already opined as to the applicability of the first clause. This court is asked to do the same for the latter.

More succinctly, this case revolves around the interplay between the Takings Clause and the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* (1994) (FLSA), which in part mandates the payment of "overtime" wages beyond the set rate of pay. Plaintiffs bring suit on the claim that the Takings Clause was violated by a congressional amendment to the FLSA's statute of limitations, which was applied to them retroactively and denied them their alleged entitlement to overtime compensation. Defendant moves to dismiss this claim on grounds of either a lack of subject matter jurisdiction or because it fails to state a claim upon which relief may be granted.

The central issue facing the court is whether the statutorily mandated overtime pay falls within the meaning of "property" under the Fifth Amendment's Takings Clause. A collateral issue is whether the nullification by Congress of plaintiffs' FLSA overtime payments amounts to a unconstitutional taking of a "cause-of-action" to sue to protect property or a right recognized by law. For the reasons set forth below, the court finds plaintiffs possess no property right cognizable under the Takings Clause of the Fifth Amendment, and therefore, the defendant's motion to dismiss must be granted.

I. Facts

The facts, unless otherwise noted, are undisputed and are drawn from the complaint, defendant's motion to dismiss, plaintiffs' motion in opposition, and the appendices attached thereto.

This case is brought on behalf of nearly 14,000 employees of the Bureau of Alcohol Tobacco and Firearms

(ATF), Drug Enforcement Agency (DEA), Internal Revenue Service (IRS), United States Customs Service (USCS), and United States Secret Service (USSS). Each plaintiff seeks over $ 10,000 in FLSA overtime back pay from the United States government.

Claims for back pay brought under the FLSA are governed by the Portal-to-Portal Act which establishes a two year statute of limitations for non-willful violations, and a three year statute of limitations for willful ones. 29 U.S.C. § 255(a) (2000). The importance of the statutory limitations period is significant in back pay cases such as this because the statute of limitations determines how many years of compensation each claimant receives. Since these are continuing claims, a separate cause-of-action accrues each payday. Thus, a six year statute of limitations means that an employee could recover six years of back pay or overtime compensation from the date of filing; whereas, a two year statute would limit recovery to only two years worth of such compensation. *See Adams v. Hinchman*, 154 F.3d 420, 422 (D.C. Cir. 1998). It thus is this difference in potential recovery that is at issue in this case.

In 1978, the General Accounting Office (GAO) issued *In re Transportation Systems Center*, 57 Comp. Gen. 441 (1978). The *In re Transportation Systems Center* opinion altered the statute of limitations period for claims brought before an administrative agency, as opposed to ones brought before the courts of law. The Comptroller General reasoned that the language of the Portal-to-Portal Act limited its applicability to "actions at law" which meant the Act only applied to those actions brought before the courts, rather than those brought before an administrative agency. *Id.* As a result, back pay cases under the FLSA brought before the GAO were governed by the Barring Act's six year statute of limitations (31 U.S.C. § 3702(b) (2002)), while FLSA back pay cases brought to the courts were still governed by the

FLSA's two or three year limitations period (29 U.S.C. § 255(a) (2002)).

Such was the state of affairs between 1990 and 1995 when plaintiffs simultaneously filed both administrative claims, and claims in this court for the FLSA overtime back pay allegedly owed them. *Adams v. United States*, 27 Fed. Cl. 5 (1992).[10] Due to the simultaneous pendency of both types of claims, the GAO stayed the administrative claims pending the outcome of the claims in the this court. During the time of the stay, however, the Comptroller General issued another opinion, *In re Joseph M. Ford*, 73 Comp. Gen. 157 (1994) ("*Ford* decision"), instructing the GAO to apply the two or three year statute of limitations to all FLSA administrative claims. This change time barred many of plaintiffs' claims. As a result, plaintiff wrote to the Comptroller General urging him to reverse the *Ford* opinion or, at least, not apply it to plaintiffs. The Comptroller General allegedly did not respond.

A month after plaintiffs' missive was mailed to the GAO, Congress effectively reversed in part the Comptroller General's *Ford* decision with passage of section 640 of the Treasury, Postal Service and General Government Appropriations Act of 1995, Pub. L. No. 103-329, 108 Stat. 2383, 2432 (1995). Section 640 mandated a six year statute of limitations for administrative claims filed *prior* to June 30, 1994, but a two year statute of limitations remained for claims filed *after* June 30, 1994.[11] Since the Comptroller

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[10] The court concluded that some of the plaintiffs employed by the named agencies were exempt from the FLSA's overtime compensation provisions, while others were not. *Id.* Thereafter, in 1994, a partial settlement was reached with the United States as to those employees the court ruled were exempt from the overtime provisions.

[11] The precise text of the statute read:

> In the administration of Section 3702 of title 31, United States Code, the Comptroller General of the United States shall apply a 6-year statute of limitations to any claim of a Federal Employee

General's decision applied retroactively, the claims of nearly 3,000 plaintiffs who fell into this latter category became time barred.

Plaintiffs then wrote to the GAO requesting a meeting to discuss the effect of section 640 on the resolution of plaintiffs' claims. The GAO responded by acknowledging that section 640 modified the *Ford* decision, but instructed the plaintiffs to exhaust their administrative claims before the particular agency (the ATF or the DEA, for example) before commencing an action before the GAO. Plaintiffs reluctantly agreed and took their claims to the ATF, DEA, IRS, USCS and the USSS. On January 27th, 1995, Stephen J McHale, attorney for the Department of Treasury (the parent agency of the ATF, DEA, IRS, USCS, and USSS), responded to plaintiffs stating that section 640 was clear and therefore plaintiffs' claims filed after June 30, 1994 were time barred. Plaintiffs thereafter received letters from each individual agency reiterating Mr. McHale's decision.

Having obtained adverse decisions from the individual agencies, plaintiffs sought review by the GAO. In plaintiffs' appeal letter, they argued: (1) plaintiffs' claims filed before June 30, 1994 should be immediately settled[12] by the GAO, and (2) as for plaintiffs' claims filed after June 30, 1994, they too should be settled since the GAO did not have authority to retroactively shorten the statute of limitations under the

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under the Fair Labor Standards Act of 1938 (29 U.S.C. § 201 et seq.) for claims filed before June 30, 1994.

12 The term "settled" is a term of art in this area of law and means "to administratively determine the validity of that claim. ... Settlement includes the making of both factual and legal determinations. The authority to settle and adjust claims does not, however, include the authority to compromise claims." GENERAL ACCOUNTING OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 11-6 (1982); *see also Illinois Surety Co. v. United States ex rel. Peeler*, 240 U.S. 214, 219, 60 L. Ed. 609, 36 S. Ct. 321 (1916).

Barring Act. Again, allegedly no response was received from the GAO.

During the pendency of the appeal to the GAO, two significant occurrences took place, which make the facts of this is case somewhat byzantine. First, plaintiffs intervened in a related case (*In re Marvin B. Atkinson*, 1996 U.S. Comp. Gen. LEXIS 27 (Jan. 29, 1996) ("*Atkinson* opinion")) in which a U.S. Customs agent brought an FLSA back pay claim before the GAO. The Customs agent's claim was filed January 1st, 1994—approximately 5 months before section 640's June 30, 1994 cut-off date—and sought six years of FLSA back pay from the government. The GAO, however, decided to withhold its opinion in *Atkinson* because the agency thought Congress would soon once again amend section 640 and thereby potentially render the GAO's decision moot. This, in turn, meant that the agency would refrain from "settling" plaintiffs' similar claims for the same reason.

The second significant occurrence took place on November 19, 1995, when the GAO's decision to withhold the *Atkinson* opinion proved prescient and Congress again amended section 640 as follows:

> This section shall not apply to any claims where the employee has received any compensation for the overtime hours worked during the period covered by the claim under any provision of law ... or to any claim for compensation for time spent commuting between the employees residence and duty station.[13]

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[13] When this amendment to section 640 was introduced, Representative Lightfoot made the following statement concerning the need for the amendment: "[t]he problem is that [the unamended statute] will cost as much as $460 million ... the conferees were faced with a choice—either pay hundreds of millions for work done many years ago ... or give the Federal workers the same rights as their private sector counterparts. ... We included language providing for the same treatment of public and private workers ... not just because it costs a lot of money,

The effect of this Amendment was to further limit plaintiffs' potential recovery. Not only were plaintiffs still restricted to the two year statute of limitations for claims filed after June 30, 1994, but the new amendment also retroactively eliminated plaintiffs' substantive rights under the FLSA to recover overtime pay for time spent commuting or to recover FLSA overtime if they had already received overtime pay under another provision of law.

The sum and substance of all of this is that plaintiffs can now be divided into two distinct groups: (1) those who filed their claims *after* June 30, 1994, and therefore, fall under the two or three year limitations period GAO applies to FLSA claims, and (2) those who filed their claims *prior* to June 30, 1994, but received overtime compensation under other provisions of law or claim overtime for time spent commuting, and are, therefore, excluded from coverage under amended section 640.

Plaintiffs filed a claim in the District Court for the District of Columbia challenging the constitutionality of section 640 of the 1995 Act, as well as the subsequent amendment to that section, under the Due Process and Takings Clauses of the Fifth Amendment. *Adams v. Bowsher*, 946 F.Supp. 37, 44 (D.D.C. 1996), *aff'd in part, vacated in part, sub nom., Adams v. Hinchman*, 154 F.3d 420 (D.C. Cir. 1998), *cert. denied*, 526 U.S. 1158, (1999). Plaintiffs due process arguments were based on the dual premise that retroactive application of both section 640 and the amendment to that section nullified plaintiffs' pending back pay claims and denied them their earned but unpaid FLSA overtime compensation.

The district court concluded that those plaintiffs who filed their claims after June 30, 1994 had no property interest in back pay claims because those claims were not

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but because it is fair." 141 CONG. REC. H12376 (Nov. 15, 1995); *see also Adams*, 154 F.3d 420, 425 (D.C. Cir. 1998).

reduced to judgment. *Adams*, 946 F. Supp. at 44. Nor, the district court also concluded, was this group of plaintiffs denied due process because unpaid overtime compensation was not a property interests as defined by the Due Process Clause. *Id.* at 41-42. As to the other category of plaintiffs, those who filed their claims prior to June 30, 1994, the district court concluded that due process was served because the retroactive application of the legislation was furthered by a rational purpose. *Id.* (citing *General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992)).[14]

As for the Takings Clause argument, the district court, applying the three-part test for regulatory takings, denied plaintiffs' claim. *Id.* at 20 (citing *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 224-225 (1986)).[15] What weighed heavily against the plaintiffs, according to the trial court, was the lack of a showing that any individual plaintiff would suffer any significant economic detriment and would lose merely "an entitlement that only in recent years had been discovered." *Id.* at 20.

On appeal, the D.C. Circuit essentially affirmed the district court's due process, equal protection, and statutory analysis. *Adams v. Hinchman*, 154 F.3d 420 (D.C. Cir. 1998) (per curium). The court held that regardless of whether plaintiffs' possessed a property interest in either the pending administrative claims or the overtime back pay, any

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[14] The district court also denied both plaintiffs' equal protection argument based on the implied equal protection component of the Due Process Clause of the Fifth Amendment (*see Bolling v. Sharpe*, 347 U.S. 497, 499 (1954)), as well an Administrative Procedure Act claim primarily challenging the GAO's *Ford* opinion. *Adams*, 946 F. Supp. at 22-26.

[15] "[T]he Supreme Court identified the following three factors: (1) the economic impact of the regulation, (2) the extent to which the regulation has interfered "with distinct investment-backed expectations, and (3) the character of the government action." *Adams*, 946 F. Supp. at 19-22. It is interesting to note that the district court in applying this balancing test for regulatory takings, merely assumed, but never analyzed, the existence of a property interest cognizable under the Takings Clause.

hypothetical property interest was properly extinguished because the retroactive economic legislation, that is, the amendment to section 640, had a legitimate legislative purpose and was furthered by rational means. *Id.* at 424-425. Accordingly, the court never reached the issue of whether plaintiffs' alleged property interest was cognizable under the Due Process Clause.

As to the takings claim, the court held that the district court lacked jurisdiction because the Tucker Act, 28 U.S.C. § 1491(a)(1), confers on the Court of Federal Claims exclusive jurisdiction over takings claims above $ 10,000. *Id.* at 425-426. Consequently, the appellate court remanded the takings claim to the district court with orders to transfer the case here.

As a result, plaintiffs filed the present complaint alleging that three separate actions effected a taking under the Fifth Amendment: (1) the GAO's *Ford* decision that retroactively limited the statute of limitations for administrative claims to two years, (2) the GAO's decision to withhold "settlement" on those of plaintiffs' claims filed before June 30, 1994 during the pendency of the *Atkinson* decision, and (3) Congress' amendment of section 640 which limited overtime and commuting compensation.

Defendant moved to dismiss the complaint under Rules 12(b)(1) and 12(b)(6) of the Court of Federal Claims (RCFC). Oral argument was heard on April 28, 2003, in Washington, D.C. Further supplemental briefing was requested by plaintiffs and granted by the court. Thereafter, plaintiffs also sought permission to file supplemental authority, which was also granted by the court.

II. Discussion

A. Standard of Review

RCFC 12(b)(6) mandates dismissal of a case where the plaintiff fails to state a claim upon which relief can be

granted. When faced with a Rule 12(b)(6) motion, the court should grant the motion only if "it appears beyond doubt that [plaintiff] can prove no set of facts in support of [its] claim which would entitle [it] to relief." *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 654, 143 L. Ed. 2d 839, 119 S. Ct. 1661 (1999) (quoting *Conley v. Gibson*, 355 U.S. 41, 46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)); *Consolidated Edison Co. v. O'Leary*, 117 F.3d 538, 542 (Fed. Cir. 1997), *cert. denied sub nom. Consolidated Edison Co. v. Pena*, 522 U.S. 1108, 140 L. Ed. 2d 103, 118 S. Ct. 1036 (1998). The facts must be viewed in a light most favorable to the plaintiff. *Papasan v. Allain*, 478 U.S. 265, 283, 92 L. Ed. 2d 209, 106 S. Ct. 2932 (1986) (citing *Scheuer v. Rhodes*, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974)); *Gould Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991).

RCFC 12(b)(1) directs dismissal when the court lacks jurisdiction over the subject matter of the case. When deciding on a motion to dismiss based on lack of subject matter jurisdiction, much like a Rule 12(b)(6) motion, this court must assume that all undisputed facts alleged in the complaint are true and must draw all reasonable inferences in the non-movant's favor. *E.g.*, *Scheuer v. Rhodes*, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974); *Boyle v. United States*, 200 F.3d 1369, 1372 (Fed. Cir. 2000); *Henke v. United States*, 60 F.3d 795, 797 (Fed. Cir. 1995); *Ho v. United States*, 49 Fed. Cl. 96, 100 (2001), *aff'd*, 30 Fed. Appx. 964 (Fed. Cir. 2002).

Conversely, unlike a Rule 12(b)(6) motion, when hearing a motion under Rule 12(b)(1), the court can consider matters outside the pleadings. *Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1584 (Fed. Cir. 1993), *cert. denied*, 512 U.S. 1235 (1994) ("[i]n establishing predicate jurisdictional facts, a court is not restricted to the face of the pleadings, but may review evidence extrinsic to the pleadings, including affidavits' and deposition testimony"). Furthermore, unlike

a Rule 12(b)(6) motion, a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), may be raised by the court *sua sponte* at any time. *Fanning, Phillips & Molnar v. West*, 160 F.3d 717, 720 (Fed. Cir. 1998) (quoting *Booth v. United States*, 990 F.2d 617, 620 (Fed. Cir. 1993), *reh'g denied* (1993)).

B. Are Statutory "Earned" Overtime Payments Property?

Defendant essentially makes two arguments, only the latter of which is really determinative. The first is that plaintiffs' case is really an FLSA case disguised in Fifth Amendment rubric. This is so, defendant argues, because the property allegedly taken and the damages resulting therefrom are plaintiffs' FLSA overtime payments. As such, the claim is in essence one for statutory entitlement under the FLSA and, regardless of what the disputed time limitations period should have been for plaintiffs' administrative claims, the claim before this court is time barred under the two year limitations period for FLSA claims in the Court of Federal Claims under 29 U.S.C. § 255(a).[16] Defendant's second argument, which when reformulated as a question presents the core issue in this case, is that plaintiffs' FLSA overtime payments do not

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16 This provision provides that:

> Any action commenced on or after May 14, 1947, to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended [29 U.S.C.A. § 201 et seq.] ....
>
> (a) if the cause of action accrues on or after May 14, 1947—may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued ...

The defendant correctly notes that this limitations provision constitutes a waiver of sovereign immunity. *See Saraco v. United States*, 61 F.3d 863, 865-866 (Fed. Cir. 1995), *cert. denied*, 517 U.S. 1166 (1996).

constitute property within the meaning of the Takings Clause of the Fifth Amendment to the United States Constitution.[17]

Nevertheless, the court believes defendant's arguments are topsy-turvy, for only if unpaid statutorily mandated overtime does not constitute property within the meaning of the Fifth Amendment's Takings Clause, is plaintiffs' claim one solely under the FLSA. If this is so, then indeed plaintiffs' hypothetical FLSA claim might very well be time barred. Thus, the issue squarely before the court involves the definition of property under the Takings Clause of the Constitution's Fifth Amendment.

As Judge Plager of the Federal Circuit observed: "A man's home may be his castle, but that does not keep the Government from taking it. As an incident to its sovereignty, the Government has the authority to take private property for a public purpose." *Hendler v. United States*, 952 F.2d 1364, 1371 (Fed. Cir. 1991). The Takings Clause of the Fifth Amendment, however, prohibits the government from "taking property for public use" unless it provides "just compensation." U.S. CONST. amend. V. What constitutes property is the initial determination

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[17] Defendant also asserts that this case is barred under the doctrine of collateral estoppel, or issue preclusion, since the issues presented were decided by the D.C. Circuit in the preceding litigation. This court rejects that argument, however, under a well established exception to collateral estoppel that blocks the doctrine's applicability where the party against whom preclusion is sought could not, as a matter of law, have raised the issue in the prior litigation. Since this court has exclusive jurisdiction over takings claims above $10,000, neither the D.C. District Court nor the D.C. Circuit would have jurisdiction over plaintiffs' claims. As a result, plaintiffs could not, as a matter of law, have raised their takings claims in the prior litigation. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 28 (1982) (noting that collateral estoppel is inappropriate where "the party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action"); *See also Golden Pac. Bank Corp v. United States*, 15 F.3d 1066, 1073-1074 (Fed. Cir.), *cert. denied*, 513 U.S. 961, 115 S. Ct. 420, 130 L. Ed. 2d 335 (1994).

triggering application of the Takings Clause to a claim. Indeed, the Federal Circuit explicitly requires defining the relevant property interest as the first of a two-step approach to takings claims. "'First, a court determines whether the plaintiff possesses a valid interest in the property affected by the governmental action, *i.e.*, whether the plaintiff possessed a 'stick in the bundle of property rights.'" *Boise Cascade Corporation v. United States*, 296 F.3d 1339, 1343 (Fed. Cir. 2002) (quoting *Karuk Tribe of Cal. v. Ammon*, 209 F.3d 1366, 1374 (Fed. Cir. 2000) (internal citation omitted)). If so, "the court proceeds to the second step, determining 'whether the governmental action at issue constituted a taking of that 'stick.'" *Id.* (quoting *Karuk Tribe of Cal.* 209 F. 3d at 1374).

Concerning step one, defendant contends that plaintiffs' claim must fail because the claim is for money and that money does not constitute property within the Fifth Amendment's Takings Clause, citing *Commonwealth Edison Co. v. United States*, 46 Fed. Cl. 29, 37-42 (2000). Def's Mot. to Dismiss at 14. Plaintiffs respond with a plethora of arguments, employing a shotgun approach with the hope that one may very well hit the target.

Plaintiffs' first shot is to distinguish *Commonwealth Edison Co.* as a case involving a government imposed payment, while plaintiffs claim involves an unlawful taking of labor, and that *Donovan v. Sovereign Security, Ltd.*, 726 F.2d 55 (2nd Cir. 1984) establishes that the U.S. Department of Labor recognizes this precept. Tr. at 49-52; Pl.'s Mot. in Opp'n to Def.'s Mot. to Dismiss at 22. Plaintiffs' second blast is the contention that their claim falls under the Supreme Court's holdings in *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155 (1980), *United States v. Larionoff*, 431 U.S. 864 (1977), *Armstrong v. United States*, 364 U.S. 40 (1960), and, more recently, *Brown v. Legal Foundation of Washington*, 123 S. Ct. 1406 (2003). *Id.* at 27; Pl.'s

Supplemental Br. in Opp'n to Def.'s Mot. to Dismiss at 1-4. As explained below, all these arguments misfire. Plaintiffs' last shot is the argument that the retroactive abolition of plaintiffs' overtime payments really is akin to a taking of a cause-of-action securing either a property interest or a right recognized by law. Pl.'s Supplemental Br. in Opp'n to Def.'s Mot. to Dismiss at 9-10. This argument misses the mark *and* the target.

In *Commonwealth Edison Co.*, the primary issue was the constitutionality under the Fifth Amendment's Due Process and Takings Clauses of the Energy Policy Act of 1992 which imposed a monetary assessment on domestic utilities for the remediation of the government's uranium enrichment facilities operated by the U.S. Department of Energy. *See* 42 U.S.C. § 2297g *et seq.* (2002). This court concluded that the imposition of the special assessment was an obligation to pay money, which did not constitute a protected property interest for Takings Clause purposes. *Commonwealth Edison Co.*, 46 Fed. Cl. at 37-42. The court also rejected the due process exaction arguments. *Id.* at 45. Because of the many companion cases pending in the Court of Federal Claims, the Federal Circuit after oral argument *sua sponte* determined to decide the case *en banc*. *Commonwealth Edison Co. v. United States*, 271 F.3d 1327 (Fed. Cir. 2001).

In upholding the trial court, the Federal Circuit held that an obligation to pay money is not a protected property interest under the Takings Clause. In so holding, the court relied upon the view of the majority of justices in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998). In this case the Supreme Court confronted the constitutionality of the retroactive liability provisions of the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. § 9701 *et seq.* (2002) ("Coal Act"). The Coal Act required certain coal operators

to fund future health benefits of current and former coal mine employees.

The Federal Circuit noted that a plurality of the Supreme Court concluded that the retroactive impact of the Coal Act resulted in an unconstitutional taking of property because it placed a "severe, disproportionate and extremely retroactive burden" on various coal operators such as Eastern. *Id* at 1336 (quoting *Eastern Enters.*, 524 U.S. at 538 (plurality opinion of O'Connor, J., joined by Rehnquist, C.J., Scalia and Thomas, J.J.)). But the Federal Circuit also observed that five justices rejected the theory that an obligation to pay money constitutes a taking because such an obligation is not the same thing as a taking of a discreet property interest.[18] *Id.* at 1339. "Thus five justices of the Supreme Court in *Eastern Enterprises* agreed that regulatory actions requiring the payment of money are not takings. We agree with the prevailing view that we are obligated to follow the views of that majority." *Id.* (citing several sister circuits for the same proposition: *Parella v.*

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[18] In his concurring opinion, Justice Kennedy disagreed with the plurality's conclusion that the Coal Act resulted in an unconstitutional taking of property because while the Coal Act may impose a staggering financial burden on the petitioner:

> it regulates the former mine owner without regard to property. It does not operate upon or alter an identified property interest, and it is not applicable to or measured by a property interest. The Coal Act does not appropriate, transfer, or encumber an estate in land (e.g., a lien on a particular piece of property), a valuable interest in an intangible (e.g., intellectual property), or even a bank account or accrued interest. The law simply imposes an obligation to perform an act, the payment of benefits.

Eastern Enters., 524 U.S. at 540. In dissent, Justices Stevens, Souter, Ginsberg, and Breyer similarly agreed that the case did not fall within the protection of the Takings Clause because "the 'private property' upon which the [Takings] Clause traditionally has focused is a specific interest in physical or intellectual property. ... This case involves not an interest in physical or intellectual property, but an ordinary liability to pay money ...." *Id.* at 554 (Stevens, Souter, Ginbsurg, and Breyer, J.J., dissenting).

Ret. Bd. of the R.I. Employees' Retirement Sys., 173 F.3d 46, 58 (1st Cir. 1999); *Unity Real Estate Co. v. Hudson*, 178 F.3d 649, 659 (3rd Cir.), *cert. denied*, 528 U.S. 963, 120 S. Ct. 396 (1999); *Holland v. Big River Minerals Corp.*, 181 F.3d 597, 606 (4th Cir. 1999), *cert. denied*, 528 U.S. 1117, 120 S. Ct. 936 (2000)).

Indeed, prior to the plurality's decision in *Eastern Enterprises*, it was well-accepted that an obligation to pay money does not constitute a taking. *See, e.g., United States v. Sperry Corp.*, 493 U.S. 52, 6 n.9, 110 S. Ct. 387 (1989) (holding that a federal statute requiring the payment of a portion of an arbitral award from the Iran-United States Claim Tribunal to the United States government did not violate the Takings Clause because, in part, "[i]t is artificial to view deductions of a percentage of a monetary award as physical appropriations of property. Unlike real or personal property, money is fungible"); *Atlas Corp. v. United States*, 895 F.2d 745, 756 (Fed. Cir.), *cert. denied*, 498 U.S. 811, 111 S. Ct. 46 (1990) (holding that Uranium Mill Tailings Radiation Control Act's requirement that uranium producers spend large sums to clean up uranium tailings piles did not constitute an unconstitutional taking of property under the Takings Clause because there is no allegation "of a physical taking of any of its property .... [Uranium producer] alleges only that it will be required to spend sums of money for reclamation of tailings and mill decommissioning").

One distinction, this court notes, is that every one of these "obligation to pay" cases involves private parties' obligation to pay pursuant to either a federal statute or regulation, whereas the case at bar is the very reverse—it is the government that is alleged to have an obligation to pay money (here FLSA alleged "earned" overtime to multiple private parties). Yet this is a distinction without a difference. The analysis turns on the identification of a

discreet property interest. All the plaintiffs have identified is a run-of-the-mill claim for liability. As the Federal Circuit in *Commonwealth Edison Co.* put it: "[W]hile a taking may occur when a specific fund of money is involved, the mere imposition of an obligation to pay money ... does not give rise to a claim under the Takings Clause of the Fifth Amendment." *Commonwealth Edison Co.*, 271 F.3d at 1340.

This conclusion by the Federal Circuit that a specific fund of money need be the subject of a takings claim naturally leads to consideration of plaintiffs' argument that such Supreme Court cases as *Webb's Fabulous Pharmacies*, *Armstrong*, and the recent *Brown* decision, support their cause. Far from helping plaintiffs, however, these precedents are wholly consistent with *Commonwealth Edison Co.* because they involve either specific sums of money or discreet property interests recognized under state or common law. *See Brown v. Legal Foundation of W shington*, 123 S. Ct. 1406 (2003) (holding that a state law requiring interest from IOLTA account be transferred to a different owner for public use could be a *per se* taking requiring the payment of just compensation to the owner); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164-65, 101 S. Ct. 446 (1980) (holding that the Takings Clause applies to monetary interest generated from the operation of a specific, separately identifiable fund of money); *Armstrong v. United States*, 364 U.S. 40, 44-46 (1960) (holding that a materialmen's lien provided under state law was a "compensable property interest within the meaning of the Fifth Amendment"). *See also Phillips v. Washington Legal Found.*, 524 U.S. 156, 160, 118 S. Ct. 1925 (1998) (holding that interest on income generated by funds held in IOLTA accounts is private property of the owner for purposes of the Takings Clause).

The court must emphasize what is and what is not involved in plaintiffs' claim. Plaintiffs are not complaining that they were not paid wages for their labor, which might hypothetically state a claim for breach of an employment agreement. They do not allege that they were not paid for overtime work. *See* Federal Employee Pay Act, 5 U.S.C. § 5541 *et seq.* (2002). What they do complain of is that they are owed money for overtime for an amount that need be calculated under the FLSA before it was amended by Congress.

This is either a standard claim for money under the FLSA or a due process claim challenging retroactive application of the amendment. However, it is not a Takings Claim under the Fifth Amendment, for even if an obligation to pay money can be considered property, no property was here seized for public use. In other words, nothing was really "taken" from plaintiffs for the of the public—at best, proceeds simply were not paid. *See Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224 (1986) (holding that there can be no compensation under the Takings Clause if "the United States has taken nothing for its own use").

Accordingly, the government did not appropriate plaintiffs' money for its own purpose. Instead, it simply did not pay plaintiffs FLSA overtime because it believed plaintiffs' exempt, a conclusion buttressed by the D.C. Circuit. *See Adams v. Hinchman*, 154 F.3d 420 (D.C. Cir. 1998), *cert. denied*, 526 U.S. 1158 (1999). Indeed, for courts to rule otherwise in cases like this one would elevate ordinary claims for monies owed by government into constitutional cases. And this court agrees with defendant that to so rule would also produce absurd semantic results. *See Branch v. United States*, 69 F.3d 1571, 1575-1576 (Fed. Cir. 1995) ("To be sure, analyzing the assessment under the principles of takings law is awkward ... because the property allegedly taken in this case was money [which]

leads to the curious conclusion that the government may take the bank's money as long as it pays the money back"). When cash payments are solely involved, it is strained to talk about cash for cash as compensation when it is really a kind of replevin or debt payment.

Plaintiffs' initial defense—that what is at stake here is not an obligation to pay earned overtime, but rather labor taken by the government—is likewise unconvincing. The primary case plaintiffs cite for the proposition that labor is in-and-of-itself property, *Donovan v. Sovereign Security, Ltd.*, 726 F.2d 55 (2nd Cir. 1984), says nothing of the kind. *Donovan* clearly is not a takings case, but a statutory FLSA case for pre- and post-judgment interest on wrongfully withheld overtime compensation by a private employer. All that was at stake in this case was at best a statutory right.

Also unpersuasive is plaintiffs subsequent argument that *Donovan* falls under the Supreme Court's holding in *Brown* because in both these cases the amount of interest owed was ascertainable. Pl.'s Supplemental Br. at 2-3. First, this misconstrues *Brown*, which held that transfer of interest to a *non-owner* of a specific IOLTA account was a taking. Unlike *Brown*, *Donovan* dealt with interest owed on a judgment not yet paid to the claimed *owner*. Second, *Donovan* is a mere liability case. The fact that the amount or type of damages sought in a claim is ascertainable does not transform it into a property right, nor elevate what is an ordinary action for money into a constitutional case.

Be that as it may, how one interprets *Donovan* is here largely academic. Plaintiffs may not at this late date raise novel theories.[19] It is not in their complaint, which instead

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[19] For instance, plaintiffs also argue that the proposition that labor is a property is supported by none other than James Madison himself, the author of the Bill of Rights, of which the Fifth Amendment is, of course, a component. Pl.'s Supplemental Br. at 1. Plaintiffs quote from an article in the Spring/Summer 1990 edition of the *Cato Journal*, which, in turn,

refers to the alleged property interest taken as "duly earned wages." Compl. at ¶¶ 40-45.

Finally, plaintiffs' multitude of other cases cited to support the proposition that statutorily earned overtime

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selectively quotes from James Madison's famous *Essay on Property*. Plaintiffs are perhaps correct in concluding that James Madison's definition of property in his famous essay (first published in the March 27, 1792 edition of *The National Gazette*) might be wide enough to encompass their labor-is-property postulate:

> This term in its particular application means 'that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual.' In its larger and juster meaning, it embraces every thing to which a man may attach a value and have a right; and which leaves to every one else the like advantage. In the former sense, a man's land, or merchandize, or money is called his property. In the latter sense, a man has a property in his opinions and the free communication of them. He has a property of peculiar value in his religious opinions, and in the profession and practice dictated by them. He has a property very dear to him in the safety and liberty of his person. He has an equal property in the free use of his faculties and free choice of the objects on which to employ them. In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights.

James Madison, *Essay of Property*, reprinted in Kurland, *The Founders' Constitution*, Vol. 1, Ch. 16, Document 23, University of Chicago Press (1987) (emphasis original, original spelling). One can readily see that Madison recognizes that his definition is broader than that of the common law and Blackstone's, which is quoted in the first sentence in this excerpt. The essay reveals that Mr. Madison's definition of property includes such ideas as freedom of conscience and religion, precepts we today typically associate with the First Amendment. Madison's ideas certainly had an immense impact on the founding generation and on posterity, but his philosophy should not be confused with *"the law."* This court is bound by precedent and other law—not by a particular political creed—no matter how personally persuasive it is to the court. Indeed, James Madison, who along with Alexander Hamilton and John Jay authored *The Federalist Papers* under the pseudonym *Publius*, likely would approve. *See* THE FEDERALIST No. 78 ("It can be of no weight to say that the courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature .... The courts must declare the sense of the law ....")(Alexander Hamilton).

payments are property requiring compensation under the Takings Clause are either inapplicable[20] or inapposite. *United States v. Larinoff*, 431 U.S. 864 (1977) is the prime example of the latter. In this case, the Supreme Court struck down the retroactive elimination of a military reenlistment bonus. A serviceman had enlisted in a special military program which trained personnel in communications technology. Because this specialized training was in short supply, the military offered Mr. Larinoff a bonus if he agreed to extend his service beyond the original enlistment period. Larinoff agreed to this "re-enlistment," however, during the time of his service Congress retroactively eliminated the bonus. The Court held that Larinoff was entitled to the bonus at the time he originally enlisted since it was at that time that he agreed to extend his service through the re-enlistment agreement.

Plaintiffs in the case at bar claim *Larionoff* applies because their right to the FLSA overtime "vested"—as plaintiffs term it—at the end of each pay period, and therefore, Congress could not retroactively eliminate plaintiffs' entitlement to that payment. Nevertheless, *Larionoff* is not a constitutional takings case establishing the existence of a property interest. Instead, it is a case of statutory interpretation establishing the right to an entitlement.[21] *Larionoff*, 431 U.S. at 868, 97 S. Ct. at 2154

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[20] Among other of plaintiffs' sundry cases cited for support are: *Cienega Gardens v. United States*, 2003 WL 21356416 (Fed. Cir. 2003); *Gonzales v. United States*, 275 F.3d 1340 (Fed. Cir. 2001); *Hatter v. United States*, 953 F.2d 626 (Fed. Cir. 1992); *National Air Traffic Controllers Ass'n v. United States*, 160 F.3d 714 (Fed. Cir. 1998); and *PI Electronics Corporation v. United States*, 55 Fed. Cl. 279 (2003). What each of these cases have in common is that they have little or nothing in common with the precise issue in this case. The court will address only those cited authorities where such citation adds a colorable argument to the controversy *sub judice*.

[21] Generally, entitlements are government conferred benefits safeguarded by procedural due process; for a claim for entitlement to be

("Both the Government and respondents recognize that [a] 'soldier's entitlement to pay is dependent upon statutory right,' and that accordingly the rights of the affected service members must be determined by reference to the statutes and regulations governing the [program], rather than to ordinary contract principles.") (citing *Bell v. United States*, 366 U.S. 393, 401, 6 L. Ed. 2d 365, 81 S. Ct. 1230, 1235 (1961)).

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considered legitimate, it must be based on something more than a unilateral expectation. *See Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). Traditionally, whether property was protected as such was determined by whether it was a right or a privilege. *See Barsky v. Board of Regents*, 347 U.S. 442, 451, 74 S. Ct. 650, 655-656 (1954) (noting that the right-privilege distinction is between common law property and state largess such as attendance in state universities). With the growth of government benefits, the distinction between rights and privileges broke down. *See generally* Reich, *The New Property*, 73 Yale L. J. 733 (1964) (certain government benefits which do not fall under traditional notions of property ought to have some protection against arbitrary government action). Towards the last decades of the Twentieth Century, the Supreme Court began to apply procedural due process to various benefits to safeguard against unfairness. *See Goldberg v. Kelly*, 397 U.S. 254 (1970) (holding AFDC welfare payments were considered "entitlements" deserving Fifth Amendment due process protection) (citing Reich, at 1017 n. 8).

The Supreme Court appears now to require protection for only those discreet interests encompassing life, liberty or property contained in the Due Process Clause. *See Lawrence v. Texas*, 123 S. Ct. 2472 156 L. Ed. 2d 508 2003 U.S. LEXIS 5013 (holding that the precept of liberty historically encompasses the protection of intimacy in the bedroom); *Roth*, 408 U.S. at 577 (holding that entitlements can not be a mere expectancy to qualify for due process protection as something akin to a statutorily created property interest). This has been interpreted as a partial return to the old right-privilege distinction. *See* Smolla, *The Re-emergence of the Right-Privilege Distinction in Constitutional Law: The Price of Protesting Too Much*, 35 Stan. L. Rev. 69 (1982); *Simon, Liberty and Property in the Supreme Court: A Defense of Roth and Perry*, 71 Cal. L. Rev. 1039, 1044 (1984). *See generally* R. Rotunda and J. Nowak, 3 Treatise on Constitutional law: Substance and Procedure (3rd ed. 1999) at 6-7.

Plaintiffs similarly cite *Zucker v. United States*, 758 F.2d 637 (Fed. Cir. 1985), for the proposition that their expectation of FLSA overtime payments is a property right. But their effort fails because, like *Larionoff*, *Zucker* is in essence a statutory entitlement case and not a Fifth Amendment takings case. In *Zucker*, the Federal Circuit held that a congressional amendment to the Civil Service Retirement Act which decreased the cost-of-living adjustments (COLA) for retirees did not violate procedural due process because retirement benefits were legitimately subject to change and, therefore, could not be considered an entitlement. *Zucker*, 758 F.2d at 639-640. In so holding, the court's analysis revolved around whether the applicable COLA was a statutory entitlement. *Id.* at 639 ("To have a property interest in a benefit protected by procedural due process, a person must have a legitimate claim of entitlement to the benefit.") (citing *Board of Regents v. Roth*, 408 U.S. 564, 577, 33 L. Ed. 2d 548, 92 S. Ct. 2701, 2709 (1972)). It is significant that the court rejected a takings argument in this context because COLA increases were statutory and not contractual in nature.[22] *Id.* at 640.

The confusion for plaintiffs lies in that *Zucker* uses the term "property interest" interchangeably with the more accurate description "entitlement." But what may be a statutorily created entitlement or "property interest" in a Due Process Clause context may or may not neatly fit into Takings Clause analysis, as *Zucker* amply demonstrates.

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[22] A problem raised before, yet not addressed by, the *Zucker* court is where a statutory program creates *both* an "entitlement" and a cognizable property interest protected under the Takings Clause of the Fifth Amendment. This may conceivably occur when the statutory program calls for, or in essence creates, a contractual relationship defined as property by common law or state law. A breach of the contract could give rise to a takings clause violation. *See Ruckelshaus v. Monsanto Co*, 467 U.S. 986 (1984). But, the property interest must be separate and distinct from any rights conferred by contract. *Prudential Insurance Co. v. United States*, 801 F.2d 1295, 1300 n.13 (Fed. Cir. 1986).

This court, however, need not reach this issue, for under the facts of the case *sub judice*, plaintiffs' claim falls under neither.

At its heart, plaintiffs' claim really is a challenge to retroactive legislation that allegedly illicitly diminished plaintiffs' then existing statutory benefits. The crux of plaintiffs' claim is therefore that the amendments to section 640 are unlawful. As a general proposition: "Such a holding, however, cannot properly derive from the Takings Clause, which is not prohibitory, but rather compensatory in nature." *Commonwealth Edison Co.*, 46 Fed. Cl. at 41-42 (quoting *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 314-315, 107 S. Ct. 2378 (1987) ("[The Takings Clause] does not prohibit the taking of private property, but instead places a condition on the exercise of that power. This basic understanding of the Amendment makes clear that it is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking.") (emphasis in original) (citations omitted). Consequently, plaintiffs' claim does not fall under the safeguard of the Takings Clause, but is at best a due process claim to secure an alleged entitlement—a claim heretofore rejected by the D.C. Circuit in *Adams v. Hinchman*.

C. Did the Retroactive Amendments to Section 640 Amount to an Unconstitutional Taking of a "Cause-of-Action" or "Right"?

Almost as an afterthought, plaintiffs present an alternative theory for recovery under the Takings Clause based on the premise that what was taken from them was a cause-of-action to protect property or another legal right. It is not all together clear what this argument entails. There are two possibilities.

The first is predicated on the fact that in the present action plaintiffs are seeking to vindicate both their "claims to FLSA back wages" and their "statutory rights ... under the FLSA." Pl.'s. Supplemental Br. in Opp'n to Def.'s Mot. to Dismiss at 9-10. Citing *Alliance of Descendants of Texas Land Grants v. United States*, 37 F.3d 1478, 1481-1482 (Fed. Cir. 1994), and *Hodel v. Irving*, 481 U.S. 704 (1987) plaintiffs correctly establish that the Takings Clause requires compensation for a taking of a cause-of-action to sue to protect a legal right, such as real property (*Alliance*), or an appropriation of a right protected by law, such as the common law right of descent and devise (*Hodel*). Plaintiffs go on to equate these two rules of law with their own cause by contending that "in the instant case, plaintiffs have been deprived not merely of their FLSA pay, which the Government has withheld for their own use, but also of [both] their statutory rights thereto under [the] FLSA" (*Id.* at 10), as well as their right to vindicate "plaintiffs' claims to FLSA back wages" (*id.* at 9 (emphasis original)).

But these contentions are fatally flawed. As to the latter two, those are legal conclusions that either were rejected by the D.C. District Court and D.C. Circuit, or belied by the salient fact that plaintiffs were able to prosecute actions to protect their constitutional, statutory and administrative rights in those fora. As to the former, that is a contention rejected by this court in the prior section of this opinion. In reality, plaintiffs are attempting to shoehorn their spurned argument that an obligation to pay overtime is a property right into the rhetoric of *Alliance* and *Hodel*. It simply does not fit.

However, perhaps—it is not clear—plaintiffs are arguing a second scenario: that because the retroactive amendment to section 640 shortened the statute of limitations period in which to vindicate FLSA statutory rights, for at least the discreet period of time lost, a cause-

of-action protecting a federal statutory entitlement was unconstitutionally extinguished. But even this somewhat more sophisticated argument must fail for essentially the same reasons as did the prior one. While it is true that in certain circumstances abolition of a cause-of-action can rise to a level of an unconstitutional taking (*see Cities Servs. Co. v. McGrath*, 342 U.S. 330, 72 S. Ct. 334 (1952); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796)), it is equally true that plaintiffs' cause-of-action must secure a cognizable "legally protected interest." *See United States v. Willow River Power Co.*, 324 U.S. 499, 503, 65 S. Ct. 761, 764 (1945). Plaintiffs have two fundamental problems in that regard. The first, as explained above, is that their claim for overtime payment is not cognizable as a property right protected by the Takings Clause. The second, is that the D.C. District Court and the D.C. Circuit on appeal upheld the legality of Congress' retroactive amendment to section 640, and rejected plaintiffs' other constitutional, as well as, statutory and Administrative Procedure Act claims.

Thus, no matter how one looks at it, no claim, in other words, no cause-of-action, to protect plaintiffs' rights has been unconstitutionally taken from them. To be sure, plaintiffs in this case are not really complaining about a taking of a specie of property. What they are in reality seeking to safeguard is a statutory grant of largesse from revocation by Congress. Such a claim more properly falls under the rubric of due process of law, a claim over which this court has no jurisdiction and which plaintiffs previously and unsuccessfully prosecuted in the D.C. District Court and the D.C. Circuit Court of Appeals.

III. Conclusion

For the foregoing reasons, defendant's motion to dismiss is **GRANTED**. The Clerk of the Court is hereby **ORDERED** to enter final judgment in favor of defendant.

NO COSTS.

Lawrence J. Block
Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STEPHEN S. ADAMS, et al.,

Plaintiffs,

v.

DAVID M. WALKER, Comptroller General of the United States, et al.,

Defendants.

Civil Action No. 95-2015.

Filed: Mar. 30, 2000

ORDER

JUNE L. GREEN, District Judge.

For the reasons stated in the attached memorandum of law, it is by the Court this 30th day of March 2000,

ORDERED that Plaintiffs' Motion for Leave under Rule 15, F.R.C.P. to Amend their Complaint; to Vacate this Court's Prior Decisions Concerning Plaintiffs' Takings Claims; and to Transfer Plaintiffs' Amended Complaint to the United States Court of Federal Claims Pursuant to 29 U.S.C. §1631, is **GRANTED** and the Clerk is directed to file Plaintiffs' First Amended Complaint, and then transfer this case to the Court of Federal Claims. The Court's rulings with regard to the Plaintiffs' takings claims are deemed **VACATED**; it is further

ORDERED that the Defendants' Motion to Dismiss is **DENIED**; and it is further

ORDERED that the Clerk shall send copies of this Order to:

Jules Bernstein, Esq.
Bernstein & Lipsett
1920 L Street, N.W., Suite-602
Washington, D.C. 20036

Edgar N. James, Esq.
James & Hoffman
1146 19th Street, N.W., Suite 600
Washington, D.C. 20036

Susan K. Rudy, Esq.
U.S. Department of Justice
Civil Division
Federal Programs Branch
Rm-968
901 E Street, N.W.
Washington, D.C. 20530

/s/ June L. Green.
June L. Green
United States District Court
Judge

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-5121

STEPHEN S. ADAMS, et al.,
Appellants,

v.

JAMES F. HINCHMAN, Acting Comptroller General of the United States General Accounting Office, et al.,
Appellees.

Argued: March 12, 1998.
Decided: Aug. 28, 1998.
Rehearing Denied: Nov. 9, 1998.

Before RANDOLPH, ROGERS, and TATEL, Circuit Judges.

PER CURIAM:

This is an appeal from the district court's judgment rejecting the claims of 14,122 current and former federal criminal investigators or other law enforcement officers. The plaintiffs were employed between 1984 and 1995 in federal agencies such as the Customs Service, the Secret Service, the Internal Revenue Service, the Drug Enforcement Agency and the Bureau of Alcohol, Tobacco and Firearms.[23] Between February 16, 1990, and

[23] The original defendants were then Comptroller General of the General Accounting Office, Charles A. Bowsher, and the heads of the various federal agencies. On September 30, 1996, Mr. Bowsher retired.

December 13, 1995, they filed civil actions in the Court of Federal Claims alleging that they had been wrongfully classified as exempt from the overtime provisions of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.* During the same period, each employee also filed an administrative claim at the Government Accounting Office. Of the 14,122 employees, 11,247 brought suit before June 30, 1994.

In a consolidated case, the Court of Federal Claims held that certain grades of employees—namely, GS-9 and GS-11 investigators at BATF, DEA, IRS, and Secret Service, and GS-9 investigators at Customs Service—were not exempt from FLSA, and thus had been entitled to overtime pay. *Adams v. United States*, 27 Fed. Cl. 5 (1992). On March 16, 1994, these plaintiffs entered into settlement agreements with the United States. The agreements gave the plaintiffs "back pay and interest ... for the two-year period prior to the date that each such plaintiff filed suit" but did not prejudice their rights to pursue administrative remedies. Counsel then corresponded with the GAO regarding the pending administrative claims.

The authority of the GAO to settle claims against the United States is found in the Barring Act, 31 U.S.C. § 3702.[24] According to the GAO, "to settle a claim means to administratively determine the validity of that claim .... Settlement includes the making of both factual and legal determinations. The authority to settle and adjust claims does not, however, include the authority to compromise claims." GENERAL ACCOUNTING OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 11-6 (1982); *see also*

The acting Comptroller General, James Hinchman, was substituted as defendant.

24 The GAO's authority to settle federal employees' compensation claims has since been transferred to the Office of Personnel Management. *See* 31 U.S.C.A. § 3702(a)(2) (West Supp.1998)

Illinois Surety Co. v. United States ex rel. Peeler, 240 U.S. 214, 219, 36 S.Ct. 321, 60 L.Ed. 609 (1916). Under 31 U.S.C. § 3702(b)(1)(A), a claim against the government "must be received ... within six years after the claim accrues except ... as provided in this chapter or another law."

Lawsuits for back pay under FLSA are subject to the Portal-to-Portal Act's statute of limitations—two years for non-willful violations and three years for willful ones.[25] *See* 29 U.S.C. § 255(a). Shortly after FLSA coverage was extended to federal employees, however, the GAO ruled that "the time limitation for the filing of claims by federal employees under the FLSA which may be considered by our office is six years ...." *In re Transportation Sys. Ctr.*, 57 Comp. Gen. 441 (1978). The GAO relied in part on a letter from the Civil Service Commission, reasoning that the language of 29 U.S.C. § 255—which spoke exclusively in terms of a "cause of action"—limited it to judicial proceedings and did not apply to administrative claims. *See also* PRINCIPLES 11-22 ("[T]he time limit for filing a claim under the Fair Labor Standards Act is the six years prescribed by [then-] 31 U.S.C. § 71a, notwithstanding a two-year statute of limitations for commencing actions at law. Thus, a claim filed under the FLSA more than two years but less than six years after it accrued could still be considered administratively, although the claimant would have lost his recourse to the courts.").

In back pay and overtime cases, the statute of limitations determines how many years of compensation each claimant receives. Since these are continuing claims, a separate cause of action accrues each payday. A six-year

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[25] One of the purposes of the Portal-to-Portal Act, enacted in response to *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 66 S.Ct. 1187, 90 L.Ed. 1515 (1946), was to substitute a uniform federal limitations period for the diverse periods provided under state law. *See Carter v. Panama Canal Co.*, 463 F.2d 1289, 1293 (D.C.Cir.1972).

statute of limitations means that an employee could recover six years of back pay or overtime compensation dating from the time he or she first filed suit.

On May 23, 1994, the GAO overruled *Transportation Systems Center*.[26] In *In re Joseph M. Ford*, 73 Comp. Gen. 157 (1994), the GAO held that the shorter statute of limitations found in the Portal-to-Portal Act would henceforth be applied "in the settlement of pending and future FLSA claims filed with GAO by federal employees." The GAO concluded that 29 U.S.C. § 255 was "another law"—and thus an exception to the six-year limitation period in 31 U.S.C. § 3701(b)(1)(A).

On July 1, 1994, Senator Sarbanes introduced legislation intended, he said, "to reverse a very destructive ruling by the General Accounting Office to apply a retroactive change in the statute of limitations from 6 years to 2 years for Federal employees to file back pay claims under" FLSA. 140 CONG. REC. S8400 (July 1, 1994). As enacted on September 30, 1994, § 640 of the Treasury, Postal Service and General Government Appropriations Act of 1995, Pub.L. No. 103-329, 108 Stat. 2383, 2432, provided:

> In the administration of Section 3702 of title 31, United States Code, the Comptroller General of the United States shall apply a 6-year statute of limitations to any claim of a Federal Employee under the Fair Labor Standards Act of 1938 (29 U.S.C. § 201 *et seq.*) for claims filed before June 30, 1994.

Senator Sarbanes added that while "the underlying question regarding the appropriate length of the statute of limitation for FLSA claims is one of continuing debate ... under no circumstances should GAO apply the proposed change retroactively." 140 CONG. REC. S8400.

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[26] In doing so, the GAO also overruled *In re Henry G. Tomkowiak*, 67 Comp. Gen. 247 (1988), and *In re Federal Firefighters*, 68 Comp. Gen. 681 (1989), which had applied the six-year statute of limitations.

In what was apparently its first decision after passage of § 640, the GAO applied a six-year statute of limitations to claims filed on May 22, 1989, and pending before it as of June 30, 1994. *See In re Molly D. Kinsley*, 1995 WL 9720 (Jan. 9, 1995). The GAO explained that § 640 "obviates the need for us to discuss the effect, if any, of *Joseph M. Ford* .... In light of section 640, the *Ford* holding is applicable only to claims filed on or after June 30, 1994." *Id.* at n. 7.

Meanwhile, counsel for the employees again contacted the GAO and requested a meeting to resolve pending claims in light of § 640. The GAO acknowledged that "the Act of Congress has modified our *Ford* decision" but pointed out that "our regulations require that the agency from which the claim originated shall initially adjudicate the claim. *See* 4 C.F.R. § 31.4 (1994)."[27] Counsel then brought their clients' claims to the attention of the employing agencies, each of which responded that § 640 gave specific authority to apply a six-year statute of limitations *only* to the Comptroller General and that the agencies themselves were without statutory authority to do so. Counsel appealed these denials to the GAO, but the GAO did not respond. However, with regard to an unrelated FLSA case, the GAO informed the Personnel Director of the U.S. Customs Service that it did "not intend to issue a decision in *Marvin B. Atkinson* ... until the Treasury, Postal Service, and General Government Appropriations Bill, 1996 ... is enacted (because of the possible retroactive repeal of § 640)."

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27 4 C.F.R. § 31.4 provides in part:

A claimant should file his or her claim with the administrative agency or department out of whose activities the claim arose. The agency shall initially adjudicate the claim. If the claimant is not satisfied with the agency's determination, he or she may appeal that determination to the Claims Group, General Accounting Office. Claims which cannot be resolved by the department or agency shall be transmitted to the Claims Group, General Accounting Office, for resolution.

> In November 1995, Congress amended § 640 to state:
>
> This section shall not apply to any claim where the employee has received any compensation for overtime hours worked during the period covered by the claim under any other provision of law, including, but not limited to, 5 U.S.C. 5545(c), or to any claim for compensation for time spent commuting between the employee's residence and duty station.

Pub.L. No. 104-52, 109 Stat. 468. Introducing this amendment, Representative Lightfoot said that the GAO, in its 1978 decision, "made a mistake and established regulations stating that Federal employees can get up to 6 years back pay for overtime claims" under the FLSA. The GAO discovered and corrected "its mistake," but then the 103rd Congress "reversed GAO, and passed a law allowing Federal workers to get up to 6 years back pay. The problem is that this act will cost as much as $460 million .... The conferees were faced with a choice—either pay hundreds of millions for work done many years ago ... or give the Federal workers the same rights as their private sector counterparts .... [W]e included language providing for the same treatment for public and private workers ... not just because it costs a lot of money, but because it is fair." 141 CONG. REC. H12376 (Nov. 15, 1995).

After the amendment of § 640, the GAO decided *Atkinson*, a case in which the plaintiffs here had been granted leave to intervene. *In re Marvin B. Atkinson*, 1996 WL 31212 (Jan. 29, 1996). Atkinson's claim had been filed on January 1, 1994, and sought compensation for the time he spent traveling between home and work while driving a government vehicle. Atkinson's employing agency denied his claim after the GAO decided *Ford*; he based his administrative appeal on the original § 640. The GAO held that "the November 19, 1995 amendment to section 640 effectively reestablishes the two-year statute of limitations

for any claim where the employee has received overtime pay under any other law or any claim for time spent commuting. We see no basis for the assertion that this amendment does not apply to Mr. Atkinson's claim." *Id.*

On October 27, 1995—before passage of the amendment to § 640 or the GAO's decision in *Atkinson*—plaintiffs brought this action in district court seeking "mandamus and injunctive and declaratory relief." The complaint challenged *Ford*'s adoption of a shortened, retroactive statute of limitation; the GAO's insistence that plaintiffs bring their claims before their respective agencies; the refusal of those agencies to grant the claims; and the GAO's refusal to pass on their appeals. In Supplemental Complaints dated December 13, 1995, and January 29, 1996, plaintiffs added the amendment to § 640 and the GAO's decision in *Atkinson* to their list of requests for declaratory relief.

Plaintiffs alleged that the GAO's decision in *Ford* and the amendment to § 640 had offended due process. They asserted property interests in their back pay claims before the GAO and in their earned but unpaid compensation.[28] On October 10, 1996, the district court (Judge June L. Green) granted defendants' motion for summary judgment. The court later denied plaintiffs' motion for reconsideration. Our review of a grant of summary judgment is de novo. With one exception, we shall affirm the district court's judgment substantially for the reasons stated in the court's thorough and well-reasoned opinion.[29]

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28 On appeal, plaintiffs also maintain that they have a property interest in the statute of limitations itself. Brief for Appellants at 45. They cite no support for the assertion of such an interest and we are aware of none. As explained earlier, the amount of overtime that plaintiffs can claim is limited by the governing statute of limitations. Thus the two are essentially the same and the same analysis applies.

29 Appellees have moved to strike section III of plaintiff-appellants' reply brief on the ground that it raised issues not advanced in their opening brief. Plaintiffs there contended for the first time that the

The district court held that the GAO's prior application of a six-year statute of limitations had been an error. *Adams v. Bowsher*, 946 F.Supp. 37, 42 (D.D.C.1996). It decided that plaintiffs had no property interest in their pending administrative claims because "a cause of action ... affords no definite or enforceable property right until reduced to a final judgment." *Id.* at 41 (quoting *Austin v. City of Bisbee, Arizona*, 855 F.2d 1429, 1436 (9th Cir. 1988)). *See also Sowell v. American Cyanamid Co.*, 888 F.2d 802, 805 (11th Cir.1989); *Hammond v. United States*, 786 F.2d 8 (1st Cir.1986). Without reaching the issue whether enactment of the original § 640 gave certain plaintiffs property rights in their unpaid overtime, we agree with the district court that any such property interest could be extinguished so long as the retroactive economic legislation met the guarantees of due process. *See General Motors Corp. v. Romein*, 503 U.S. 181, 191, 112 S.Ct. 1105, 117 L.Ed.2d 328 (1992). Analyzing the legislative history of the amendment to § 640, the district court found that the statute had a "legitimate legislative purpose which was furthered by rational means." 946 F.Supp. at 44 (relying on *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730, 104 S.Ct. 2709, 81 L.Ed.2d 601 (1984) and *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15, 96 S.Ct. 2882, 49 L.Ed.2d 752 (1976)). The court emphasized that Representative Lightfoot's statement indicated a desire to promote fairness and to equate "the rights enjoyed by federal employees to those of private sector employees." 946 F.Supp. at 43.

Back Pay Act, 5 U.S.C. § 5596, and the Civil Service Reform Act, 5 U.S.C. § 7121(a), display congressional intent to treat federal and private sector employees differently. *See* Reply Brief for Appellants at 10-13. It is our practice not to consider any issue "raised for the first time in a reply brief," a point at which the opposing side has no opportunity to respond. *See Rollins Environmental Servs., Inc. v. EPA*, 937 F.2d 649, 652 n. 2 (D.C.Cir.1991). We grant the motion to strike.

As for plaintiffs' equal protection claim, the district court determined that plaintiffs and the *Kinsley* claimants, whose claims had been subject to a six-year statute of limitations, were not similarly situated. *Id.* at 45. Unlike the claimants in *Kinsley*, plaintiffs did not have a sufficiently developed factual record for their claims to be processed by the GAO prior to the enactment of the amendment. In addition, plaintiffs charged that the GAO violated the Administrative Procedure Act in deciding *Ford* and in failing to handle their cases in a timely fashion—*i.e.*, before § 640 was amended. Such claims were moot, the district court concluded, because Congress "had impliedly adopted the two or three-year limitation period" and the amendment "passe[d] constitutional muster." 946 F.Supp. at 45. Thus the *Ford* and *Atkinson* decisions were valid and it was beyond the power of the court to compel the GAO to apply a longer statute of limitations.

While we therefore are in general agreement with the district court, we cannot affirm the portion of the court's decision holding that plaintiffs' "property" had not been taken without just compensation, in violation of the Fifth Amendment to the Constitution. *See Adams*, 946 F.Supp. at 44. Applying the test for a compensable taking set forth in *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224-25, 106 S.Ct. 1018, 89 L.Ed.2d 166 (1986), the district court concluded that any economic impact on individual plaintiffs was slight, that the amended § 640 did not "unduly interfere with a distinct investment-backed expectation," and that "the nature of the action taken by Congress is not inconsistent with the purpose behind the takings clause." 946 F.Supp. at 44.

Repeating the argument they made below, plaintiffs argue that "deprivation of [their] previously earned FLSA wages constitutes an unlawful taking of [their] labor without just compensation under the Fifth Amendment." Brief for

Appellants at 19. We are without jurisdiction to decide this claim. The usual remedy for unconstitutional takings is "a suit for money damage (i.e., the 'just compensation' that the Constitution assures) under the Tucker Act in the Court of Federal Claims, 28 U.S.C. § 1491 ...."[30] *Student Loan Marketing Ass'n v. Riley*, 104 F.3d 397, 401 (D.C.Cir.1997). "Except in cases in which the amount in controversy is less than $10,000, in which event jurisdiction is concurrent with the federal district courts, *see* 28 U.S.C. § 1346(a)(2), the Federal Claims Court's jurisdiction in such actions is exclusive." *Railway Labor Executives' Ass'n v. United States*, 987 F.2d 806, 816 (D.C.Cir.1993). While there may be certain exceptions "involv[ing] mandates of direct transfers of money to the government," *see Student Loan Marketing Ass'n*, 104 F.3d at 401 (quoting *In re Chateaugay Corp.*, 53 F.3d 478, 493 (2d Cir.1995)), they are not applicable here. At oral argument, counsel for the plaintiffs represented that each of their individual claims amounted to more than $10,000. If that were true, the district court would not have had jurisdiction to hear the taking claim in the first place. Even if each back pay claim were less than $10,000 and jurisdiction was based on the "Little Tucker Act" (28 U.S.C. § 1346(a)(2)), the United States Court of Appeals for the Federal Circuit—not us—would have exclusive jurisdiction over the appeal. *See* 28 U.S.C. § 1295(a)(2). Either way then, plaintiffs' taking claim is not properly before us.[31] We

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30 In relevant part 28 U.S.C. § 1491(a)(1) provides:

> The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

31 After oral argument, the parties called our attention to two recently decided cases—*National Treas. Employees Union & Federal Deposit Ins. Corp.*, 53 F.L.R.A. No. 134 (Feb. 27, 1998); and *Eastern Enterprises v. Apfel*, — U.S. —, 118 S.Ct. 2131, 141 L.Ed.2d 451 (1998)

therefore remand the takings issue to the district court for a determination of whether jurisdiction was proper under the Little Tucker Act, 28 U.S.C. § 1346(a)(2).

For the reasons stated above, the district court's grant of summary judgment is affirmed in part and reversed and remanded in part.

So ordered.

(plurality opinion). Neither decision affects the outcome of this case. *National Treasury Employees Union* appears to support the reasoning of the district court. In *Eastern Enterprises*, four Justices concluded that it was within the district court's power to award equitable relief for a claim arising under the Takings Clause. *See* — U.S. at —, 118 S.Ct. at 2145 (quoting *In re Chateaugay Corp.*, 53 F.3d at 493). Unlike *Eastern Enterprises*, plaintiffs here are not threatened with a taking by a "challenged statute" that "requires a direct transfer of funds" from them to the government. *See id.* Rather, they seek compensation from the government for unpaid overtime. The only effect of a longer statute of limitations would be to grant plaintiffs more money. Thus the circumstances found to support district court jurisdiction in *Eastern Enterprises* do not exist in this case.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STEPHEN S. ADAMS, ET AL., PLAINTIFF,

V.

CHARLES A. BOWSHER, COMPTROLLER GENERAL OF THE UNITED STATES, ET AL., DEFENDANTS

CIVIL ACTION NO. 95-2015
FILED MARCH 7, 1997

MEMORANDUM

JUNE L. GREEN, United States District Court Judge

Before the Court is Plaintiffs' motion for reconsideration and to alter and amend this Court's Order dated October 10, 1996. The motion is made pursuant to Federal Rule of Civil Procedure 59(e). As a basis for this motion, Plaintiffs argue that reconsideration is required because the Court relied on theories not litigated by the parties and that the Court's conclusions, in certain respects, are contrary to the facts and law. For the reasons that follow, Plaintiff's motion is denied.

A motion brought pursuant to Federal Rule of Civil Procedure 59(e) gives the Court discretionary authority to reconsider an earlier ruling when there has been an "intervening change of controlling law, new evidence becomes available, or there is need to correct a clear error or prevent manifest injustice." Firestone v.Firestone, 76 F.3d 1205, 1208 (D.C. Cir. 1996), citations omitted.

I. LEGITIMATE LEGISLATIVE PURPOSE

Plaintiffs argue that the Court erred on several important points in reaching its decision. First, Plaintiffs

state that the Court erred by assuming that Plaintiffs would have received "double overtime compensation" had it not been for amended Section 640. The Plaintiffs misinterpret the Court's use of the phrase "double overtime compensation." Whether these Plaintiffs sought or were entitled to "double overtime compensation" is irrelevant to the Court. In analyzing the legitimacy of the Treasury, Postal Service, and General Government Appropriations Act of 1996, Pub. L. 104-52, 109 Stat. 468-69 (1995)("amended Section 640"), the Court meant only to show that the provision excluding employees who had received overtime compensation under another provision of law, was reasonable. As the Court concluded, "fairness" was one of the reasons given for enacting amended Section 640. It is rational for Congress to have determined that employees who had not been compensated under another provision of law were entitled to a longer limitations period.

II. EQUALITY OF FEDERAL WORKER LIMITATIONS PERIOD

Plaintiffs argue also that Congress could not have been attempting to place private and government workers in a position of parity with regard to commuting time because non-federal workers generally are afforded fewer rights to overtime under the Fair Labor Standards Act ("FLSA"). Plaintiffs go to some length to show that many differences exist between the rights of federal and private sector employees in the application of the FLSA and argue that parity between the two groups has never been a goal of Congress.

Again, Plaintiffs have misinterpreted the Court's analysis. In concluding that Congress acted rationally concerning the commuting provision of amended Section 640, the Court determined that equating rights of federal employees and private sector employees under the FLSA was, in fact, one of the reasons for enactment. This does not

mean, however, that the rights of federal and private sector employees must be equalized in every aspect under the FLSA in order for the statute to survive scrutiny. Even if differences remain concerning the rights of the two groups, equating the limitation period for federal and private sector employees for commuting claims is consistent with Congress' stated intention of "fairness" and complies with the rational basis test.

III. APPLICABILITY OF THE WINSTAR DECISION

Plaintiffs next argue that the Court erred by applying the permissive rational basis test. In support, Plaintiffs cite the recent case United States v. Winstar Corp., 116 S.Ct. 2432 (1996), for the proposition that the federal government is held to a higher standard where it seeks to avoid obligations it voluntarily assumed. Plaintiffs argue that the Court failed to address this case in its ruling.

Quite simply, the Court did not address the Winstar decision because it is not applicable to the facts here. The Winstar decision is a contract case that deals with the federal government's breach of the terms of an express agreement into which it had voluntarily entered. Id. There the Plaintiffs, viable financial institutions, were induced by the federal government (Federal Home Loan Bank Board ("FHLBB")) to acquire failing thrifts in return for being given certain accounting treatment. Thereafter, Congress enacted the Financial Institutions Reform Recovery and Enforcement Act of 1989 ("FIRREA") making accounting standards for thrifts more stringent. The result of FIRREA was that it effectively altered the existing contracts because it changed the accounting standards. Consequently, two of the plaintiff institutions failed and were forced into liquidation. The Supreme Court, in a plurality decision, concluded that the express contracts had been breached and the plaintiffs were entitled to damages. Id. at 1. The

Plaintiffs here, by contrast, did not plead this case as a contract action. Further, there have never been any facts to suggest the existence of an express contract. An implied contract theory, similarly, is not available to Plaintiffs because, as the Defendants properly point out, any entitlement federal employees may have to compensation is not determined by ordinary contract principles, but by applicable statutes and regulations governing compensation. Kizas v. Webster, 707 F.2d 524, 535 (D.C. Cir. 1983) (citing United States v. Larionoff, 431 U.S. 864, 869 (1977).) The Court has already addressed those statutes and regulations and has made the appropriate rulings.

Even if there were an express contract in this case (or an actionable implied contract), Winstar would not apply. The Supreme Court in Winstar made it clear that nothing in the Winstar record "purported to prevent the Government from changing the way it regulated the thrift industry." Winstar at 28. Contrary to the Plaintiffs here, the plaintiffs in Winstar did not seek to invalidate the new statute nor did they seek injunctive relief against application of the new law. Id. at 41.[1] Instead, the Winstar Plaintiffs sought money damages for breach of the Government's express agreements, and it was on that basis that the Supreme Court made its analysis. The Plaintiffs are simply incorrect in stating that in Winstar "the legislation [FIRREA] was declared unconstitutional." (Mtn. for Recon. at 20).

IV. PLAINTIFFS' "TAKING" CLAIM

The Plaintiffs next argue that this Court erred when it denied their "taking" claim on the basis that Plaintiffs would not suffer a great economic impact. In support, Plaintiffs now allege that each employee would be entitled to

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[1] The Plaintiffs here have never asked for money damages. Instead, they seek declaratory and injunctive relief concerning the statutory limitations period for filing administrative claims. Compl. pp. 1234-1236.

approximately $28,000 in back pay and argue that such an amount is not insubstantial.

The Plaintiffs take issue with the relevance the Court attributes to the fact that this case was not brought as a class action. The Plaintiffs are correct in that the amount of loss to the Plaintiffs would be the same even if this case had been brought as a class action. What the Court was attempting to show, however, was that the Plaintiffs had provided no record evidence reflecting their alleged individual losses and therefore the Court could only speculate as to economic impact. Even now, the Plaintiffs ask the Court to divide an estimated amount a congressman stated during a congressional debate by the number of Plaintiffs here, in order to arrive at an average amount for each Plaintiff. The Court declines to do so.

More important, even if it could be shown that there was a great economic impact on the Plaintiffs, it would not change the Court's holding. As discussed in the original Memorandum and Order, the Court made its conclusions regarding the "taking" claim on the basis that the alleged investment-backed expectation was the limitation period rather than back-pay (which was never sought in the Complaint). The Court determined that there was no legitimate "investment-backed expectation" to a six-year limitation period.

V. RETROACTIVE SHORTENING OF THE STATUTE OF LIMITATIONS

Another basis upon which Plaintiffs ask for reconsideration is that the Court allegedly ignored authority that retroactive shortening of a limitations period is improper. The Court did not address those cases because it determined that such an argument was subsumed by the earlier analysis concerning the viability of the claims at issue and whether the statutes in question withstood

scrutiny. The Plaintiffs present nothing now that would cause the Court to re-visit this issue.

VI. THE DOCTRINE OF EQUITABLE TOLLING

Yet another reason the Plaintiffs ask for reconsideration is on the basis that the "doctrine of equitable tolling" prevents the retroactive application of amended Section 640. Contrary to what Plaintiffs argue, this is a new argument that could have been, but was not, raised earlier. Federal Deposit Insurance Corporation v. Meyer, 781 F.2d 1260, 1268 (7th Cir. 1986)(motions to alter or amend cannot be used to raise arguments which could, and should, have been made before the judgment issued, nor can such motions be used to argue a case under a new legal theory (internal citations omitted)). It is, therefore, untimely.

Even if this claim had been raised in a timely fashion, the Court's conclusion would have been no different. The doctrine of equitable tolling is a judicially constructed doctrine that allows a limitation period to be tolled in two situations: 1) where a Plaintiff files a defective pleading within the statutory period, or 2) "where a complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." Irwin v. Dept. of Veterans Affairs, 498 U.S. 89, 96 (1990), citing, Glus v. Brooklyn Eastern Dist. Terminal, 359 U.S. 231 (1959)(adversary's misrepresentation caused plaintiff to let filing period lapse). The Plaintiffs argue that equitable tolling should apply here because they relied on agency notices that the statute of limitations for filing FLSA claims was six years. Reliance alone, however, is not enough. Missing from Plaintiffs' argument is any allegation that the agency engaged in misrepresentation as did the Defendant in Glus. Without the element of intentionality of some wrongdoing, the Court concludes that the doctrine of equitable tolling would not be available to Plaintiffs even if this theory had been raised in a timely manner.

Even more important, Plaintiffs cite no authority that the doctrine of equitable tolling can be used to contravene express congressional action. Congress has considered all of the factors and equities at issue and its conclusions are contained in amended Section 640.

VII. "EQUAL PROTECTION"

As a final basis for reconsideration, Plaintiffs ask the Court to revisit the issue of equal protection. The Court has reviewed Plaintiffs' arguments on this issue and concludes that nothing has been presented that the Court has not already considered. No further analysis, therefore, is warranted and the Court will not alter its Judgment in this regard.

VIII. CONCLUSION

For the reasons stated, the Court finds no basis to alter its Judgment in this case. The Plaintiffs have failed to show that there has been an intervening change of controlling law, new evidence has become available, or there is need to correct a clear error or prevent manifest injustice. Accordingly, Plaintiffs' motion is denied. An appropriate order accompanies this Memorandum.

/s/ June L. Green.
June L. Green
United States District Court Judge

DATE:

[March 6, 1997]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STEPHEN S. ADAMS, ET AL., PLAINTIFF,

V.

CHARLES A. BOWSHER, COMPTROLLER GENERAL OF THE UNITED STATES, ET AL., DEFENDANTS

CIVIL ACTION NO. 95-2015
FILED MARCH 7, 1997

ORDER

Upon review of Plaintiffs' Motion Under F.R.C.P. Rule 59(e) for Reconsideration and to Alter and Amend the Judgment Filed Herein, the Opposition and Reply thereto, the entire record herein and for the reasons stated in the accompanying memorandum of law, it is by the Court this 6th day of March 1997,

ORDERED that Plaintiffs' motion is DENIED; and it is further

ORDERED that the Clerk shall mail copies of this Order to:

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/s/ June L. Green.
June L. Green
United States District Court
Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STEPHEN S. ADAMS, et al.,

Plaintiffs,

v.

CHARLES A. BOWSHER, Comptroller General of the United States, et al.,

Defendants.

Civil Action No. 95-2015.

Filed: Oct. 10, 1996

MEMORANDUM

JUNE L. GREEN, District Judge.

Before the Court are Plaintiffs' Motion for Summary Judgment and Defendants' Motion for Judgment on the Pleadings, or, in the Alternative, for Summary Judgment. For the reasons stated hereafter, Plaintiffs' motion is denied and Defendants' motion for Summary Judgment is granted.

I. *BACKGROUND*

Plaintiffs are current or former employees of the United States, employed by one of several agencies as criminal investigators or in some other law enforcement capacity. Those agencies include the Bureau of Alcohol, Tobacco and Firearms ("BATF"), Drug Enforcement Administration ("DEA"), Internal Revenue Service ("IRS"), Customs Service ("Customs"), and the U.S. Secret Service ("Secret Service").

In February of 1990, Plaintiffs brought actions in the United States Court of Federal Claims ("CFC"), alleging,

inter alia, that they improperly had been considered exempt from the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* ("FLSA"), and were entitled to compensation for unpaid overtime wages.[2] (Compl. ¶ 16). Identical claims were filed simultaneously with the General Accounting Office (GAO). (Compl. ¶ 20). In a decision dated October 30, 1992, the CFC concluded that some of the Plaintiffs employed by those agencies were exempt from the FLSA's overtime compensation provisions, while others were not exempt. *Adams v. United States*, 27 Fed.Cl. 5 (1992). Thereafter, in March 1994, the United States reached "partial" settlement agreements with those plaintiffs the CFC had determined to have been non-exempt from the FLSA. *See* Bernstein Decl., Exhibits 8-10.

In the wake of the CFC decision, as well as the ensuing settlements, Plaintiffs in this case, on April 12, 1994, attempted to have their previously filed administrative claims resolved by GAO. Def.Mot.Sum.J., Ex. 4. On May 23, 1994, GAO issued a ruling in a case similar to Plaintiffs', concluding that the two or three-year statute of limitations period contained in the Portal-to-Portal Act, 29 U.S.C. § 255(a), rather than the six-year limitations period contained in the Barring Act, 31 U.S.C. § 3702(b)(1), was applicable to all pending and future FLSA administrative claims, and, therefore, the claim was time barred. *Matter of: Joseph M. Ford*, 1994 WL 201742 (C.G.) (May 23, 1994). This decision reversed the GAO's previous longstanding interpretation that a six-year limitation period applied for filing FLSA claims.[3]

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[2] Those cases have been consolidated in the CFC under the caption *Adams v. United States*, No. 90-162C.

[3] In fact, GAO had been applying the six-year limitations period found in the Barring Act as early as 1978 and at least twice thereafter. *See Transportation Systems Center*, 57 Comp.Gen. 441 (1978); *Federal Firefighters*, 68 Comp.Gen. 681 (1989).

On September 30, 1994, a six-year statute of limitations for FLSA claims filed with GAO was enacted by Congress with the passage of the 1995 Treasury, Postal Service and General Government Appropriations Act, P.L. 103-329, § 640, 108 Stat. 2432 (1994). ("1995 Act.") Section 640 of the 1995 Act ("original Section 640") directed that a six-year statute of limitations be applied for all claims filed prior to June 30, 1994, thereby reversing the GAO's decision in *Ford. Id.* Notwithstanding, Plaintiffs' claims before GAO were not resolved. Instead, Plaintiffs were told that their claims must first be filed with the Plaintiffs' employing agencies. Def.Mot.Sum.J., Ex. 7.

As directed, Plaintiffs filed their claims in the form of letters to the employing agencies outlining their claims.[4] Def.Mot.Sum.J., Exs. 13, 14.

Between February 15 and May 9, 1995, the agencies denied Plaintiffs' claims on the basis that Section 640 of the 1995 Act authorized only the Comptroller to apply a six-year statute of limitations. Def.Mot.Sum.J., Ex. 15. Plaintiffs appealed these decisions to the GAO. Def.Mot.Sum.J., Ex. 16. The GAO, however, did not act on the appeals immediately, but instead sought comments from the employing agencies. Def.Mot.Sum.J., Ex. 17.

On November 19, 1995, Congress amended Section 640 of the 1995 Act, reaffirming the six-year limitation period for FLSA claims filed prior to June 30, 1994, but making the section inapplicable to employees who had previously "received any compensation for overtime hours worked during the period covered by the claim under any other provision of law ..." and for time spent driving between home and duty station. Treasury, Postal Service, and

---

[4] Although only those Plaintiffs who had filed before June 30, 1994, were affected by the 1995 Act, the excluded Plaintiffs continued to argue that they should be extended a six-year limitation period, as well. Def.Mot.Sum.J., Ex. 9 at 2.

General Government Appropriations Act of 1996, Pub.L. 104-52, 109 Stat. 468-69 (1995). ("amended Section 640"). GAO has since applied this statute to deny claims for compensation where an employee was paid for administratively uncontrollable overtime ("AUO") and for time spent driving between the claimant's home and office. *Matter of: Marvin B. Atkinson*, 1996 WL 31212 (C.G.) (January 29, 1996).

II. *DISCUSSION*

This case presents complex issues of law because it not only requires interpretation of various competing statutes, but raises constitutional questions, as well.

Plaintiffs argue that Section 640 of the 1995 Act, as well as the subsequent amendment to that section, violate due process because they operate retroactively to divest Plaintiffs of already earned overtime pay. The Government asserts that no property rights are implicated and, even if there were, the government acted properly because its purpose in passing the statute was both reasonable and rational.

The analytical framework for this case begins with whether Plaintiffs had a vested property interest at stake, *see Association of Accredited Cosmetology Schools v. Alexander*, 979 F.2d 859, 864 (D.C.Cir.1992), and, if so, whether the retroactive effect of such economic legislation had a "legitimate legislative purpose furthered by rational means." *General Motors Corp. v. Romein*, 503 U.S. 181, 191, 112 S.Ct. 1105, 1112, 117 L.Ed.2d 328 (1992) (*quoting Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730, 104 S.Ct. 2709, 2718, 81 L.Ed.2d 601 (1984)). An examination of the relevant statutes serves as a starting point.

A. *Statute of Limitations Under Fair Labor Standards Act (FLSA)*

The Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, which allows claims for unpaid overtime compensation to employees, was made applicable to federal workers by amendment in 1974. 29 U.S.C. § 207(a) (1974). The Statute of Limitations for FLSA claims is found in the Portal-to-Portal Act and allows for a two-year limitations period in cases where the violation of the FLSA is nonwillful and three years where the violation is willful. 29 U.S.C. § 255(a) (1947). Notwithstanding the provisions of the Portal-to-Portal Act, the GAO, pursuant to its authority to settle administrative claims under the Barring Act, 31 U.S.C. § 3702, traditionally has applied the six-year statute found in that section, to administrative FLSA claims. *See Transportation Systems Center*, 57 Comp. Gen. 441 (1978); *Federal Firefighters*, 68 Comp. Gen. 681 (1989).

As stated previously, this policy changed with GAO's decision in *Ford* when the GAO determined that the two or three-year statute of limitations contained in the Portal-to-Portal Act (which is expressly applicable to the FLSA) trumped the six-year period found in the Barring Act. *Ford* at 4. In so concluding, the GAO relied on the language of the Barring Act, which establishes a six-year limit on filing claims with GAO "except ... as provided by ... another law." 31 U.S.C. § 3702(b)(1)(A). The GAO determined "another law" to be the Portal-to-Portal Act and denied the claims on that basis. *Ford* at 4.

Congress, however, extended the two or three-year limitation period to six years by passing Section 640 of the 1995 Act. Although this section effectively reversed the *Ford* decision, it did so only for those Plaintiffs who filed their claims prior to June 30, 1994. Moreover, the amendment to Section 640, enacted a year later, placed further limitations on even these individuals by making the

six-year limitation period applicable only to those who had not received overtime compensation under other specified statutes and circumstances or, whose claims involved commuting time. 1996 Act, § 640.

As matters now stand, the Plaintiffs can be divided into two distinct groups for purposes of this analysis: 1) those who filed their claims after the June 30, 1994, date, and, therefore, fall under the 2-3 year limitation period GAO applies to FLSA claims, and 2) those who filed their claims prior to June 30, 1994, but received overtime compensation under other provisions of law or claim overtime for time spent commuting, and are, therefore, excluded from coverage under amended Section 640.

In either instance, the Court, as an initial matter, must decide whether there is a property interest at stake.

B. *Property Interest*

The two alleged property interests advanced here are: 1) "pending and accrued administrative backpay claims" and 2) "earned but unpaid FLSA overtime compensation." Pls'.Mot.Sum.J. at 1, 44. Courts have held that a cause of action, while a "species of property" protected by due process, nonetheless is "inchoate, and affords no definite or enforceable property right until reduced to a final judgment." *Austin v. City of Bisbee, Arizona*, 855 F.2d 1429, 1435 (9th Cir.1988), *citing In re Consolidated U.S. Atmospheric Testing Litigation*, 820 F.2d 982 (9th Cir.1987). In the *Austin* case, the Plaintiff was a police officer who had filed his FLSA claim in court. Before the court ruled, however, Congress passed retroactive legislation that effectively extinguished the plaintiff's claim. The appellate court concluded that the Plaintiff had failed to perfect his rights prior to the change in the law, and, therefore, had no property interest in the cause of action. *Id.* at 1435. Here, of course, there is no final judgment involving the Plaintiffs' claims and so, the Court reaches a similar conclusion.

With regard to Plaintiffs' alleged property interest in their "earned but unpaid FLSA overtime compensation," the Court views this as a much closer question. "Property rights to public benefits are defined by the statutes or customs that create the benefits." *Jones v. Reagan*, 748 F.2d 1331, 1338 (9th Cir.1984) *citing Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972). The court in *Austin* dealt with this issue contritely by relying on the decision in *Jones* which stated: "When ... the statute authorizing the benefits is amended or repealed, the property right disappears." *Id.* Although the outcome essentially is correct, the Court is not inclined to agree with the reasoning in *Jones*.

Prior to FLSA being made applicable to federal workers, there was no expectation of overtime compensation under FLSA and, therefore, no due process property interest. Once added to the FLSA, however, federal workers could thereafter expect to receive overtime compensation treatment under FLSA. While this arguably created a property interest, such a conclusion, without looking further, misses the point that the FLSA is a creature of statute and can only confer benefits contained within the statute. The expectation to overtime compensation, therefore, is governed by the provisions of the FLSA and any other applicable statutory provisions. The question then becomes, exactly what rights did the FLSA and relevant statutes confer on the Plaintiffs, *e.g.*, what is the applicable statute of limitations period for the Plaintiffs?

It is at this juncture of the analysis that the posture of the two groups of Plaintiffs becomes important. For the Plaintiffs who filed their claims after June 30, 1994, or are otherwise excluded under amended Section 640, the question is whether they should have been given the two or

three-year limitation period under the Portal-to-Portal Act, or the six-year period under the Barring Act.

Plaintiffs claim that the Barring Act refers to administrative claims while the Portal-to-Portal Act refers only to "causes of action" filed in court. The Court finds no support for such a position. The Court agrees with the reasoning in *Hickman v. United States*, 10 Cl.Ct. 550, 552 (1986), in which the CFC concluded that Congress acted deliberately in setting the limitation period at two or three years and that there was nothing in the legislative record indicating congressional intent to impart a more liberal limitations period to federal employees than to employees in the private sector. Accordingly, this Court cannot construct a statutory interpretation contrary to congressional intent. *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

The Court is aware that for many years the GAO applied a six-year statute of limitations to FLSA claims filed administratively. The simple fact is that GAO was wrong to do so. Until the passage of Section 640 in the 1995 Act, GAO had no authority to permit a 6 year limitation period for FLSA claims. Moreover, GAO's error cannot impart an expectation sufficient to create a property interest. As the Defendants correctly point out, GAO is granted its authority by Congress and is subject to any limitations Congress may impose. *Chrysler Corp. v. Brown*, 441 U.S. 281, 302, 99 S.Ct. 1705, 1718, 60 L.Ed.2d 208 (1979). ("The legislative power of the United States is vested in the Congress, and the exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes."). Here, that limitation was a two or three-year limitation period for FLSA claims. The Court concludes, therefore, that Plaintiffs who are not included under the amended Section 640 (because their claims were

filed after June 30, 1994) have no property interest in back pay claims or unpaid overtime compensation.

The remaining Plaintiffs are a different matter. When Congress extended the statute of limitations for FLSA claims to six years by passage of the original Section 640 of the 1995 Act, Plaintiffs suddenly acquired property interests in their unpaid overtime compensation. Although amended Section 640 excludes many of those who otherwise would have fallen within the original Section 640, the Court does not find that these Plaintiffs automatically lose their property interests. The Court disagrees with the reasoning in *Jones* and *Austin* that Congress may extinguish an otherwise vested property interest concerning agency action merely by passing new legislation. This distinction, however, is academic in light of Congress's authority to deny Plaintiffs their property under a different standard.

C. ***Economic Legislation and Due Process***

The Supreme Court has held that retroactive economic legislation is permissible even if it interferes with legitimate expectations as long as it meets due process guarantees. *Pension Benefit Guaranty Corporation v. R.A. Gray and Co.*, 467 U.S. 717, 730, 104 S.Ct. 2709, 2718, 81 L.Ed.2d 601 (1984). In order for due process to be satisfied, economic legislation, applied retroactively, must have "a legitimate legislative purpose furthered by rational means." *General Motors Corp. v. Romein*, 503 U.S. 181, 191, 112 S.Ct. 1105, 1112, 117 L.Ed.2d 328 (1992). In fact, such legislation is given a presumption of constitutionality and the burden rests on the party challenging the statute to show that it was "arbitrary and irrational." *Usery v. Turner Elkhorn*, 428 U.S. 1, 15, 96 S.Ct. 2882, 2892, 49 L.Ed.2d 752 (1976).

There is no question that the legislation involved is economic in nature. Amended Section 640 involves the limitations period for money claims made under FLSA. *See Austin v. City of Bisbee*, 855 F.2d at 1435 ("The FLSA is one

of myriad 'legislative Acts adjusting the burdens and benefits of economic life.'" (internal citations omitted)). Further, by its express language, amended Section 640 is retroactive because it applies to individuals who filed their claims prior to June 30, 1994. Moreover, the statute takes away property rights conferred by the original Section 640 by excluding individuals if they have received overtime compensation under different provisions or if their claims involve overtime for commuting.

The question then becomes whether the purpose of the act was legitimate. In determining the legislative purpose, the Court looks both to the legislative history and the language of the statute for guidance.

The legislative record for amended Section 640 is sparse. In fact, there appears to have been little debate on the matter when it came up for a vote on the floor of the House of Representatives on November 15, 1995. What little debate there was took the form of a statement made by Representative Lightfoot in which he indicated that the bill had bipartisan support. 141 Cong.Rec. H12371-02, H12376 (Nov. 15, 1995). Rep. Lightfoot urged passage of the bill on the basis that the government would otherwise be required to pay out an unanticipatedly large sum of money and that government workers should be given the same rights as their private sector counterparts. *Id.* Rep. Lightfoot concluded by stating: "We agreed, not just because it costs a lot of money, but because it is fair." *Id.*

Were the purpose of this statute merely about saving money, the Court would find the legitimacy element to be a more difficult question. As the record shows, however, avoiding a large expenditure is only one of the several stated purposes behind Amended Section 640. More telling is the legislature's stated intention to put federal workers in the same position as private sector workers—a position

consistent with the 1974 legislation which made FLSA applicable to federal workers.

Complicating this analysis, however, is the final language of Amended Section 640, which provides:

> This section shall not apply to any claim where the employee has received any compensation for overtime hours worked during the period covered by the claim under any other provision of law, including, but not limited to, 5 U.S.C. 5545(c), or to any claim for compensation for time spent commuting between the employee's residence and duty station.

109 Stat. 468-69. If the intention was to equate the rights of federal workers with the private sector, then why did Congress leave the six-year limitation period relatively intact for some employees? Such language seemingly creates a contradiction between one of the purposes for the legislation, and the final language of Amended Section 640.

The Court, however, is only slightly concerned about such a discrepancy. Perhaps Congress, wanting to be "fair" to many who had already filed their claims, let stand the six-year limitation period for those whose claims had been filed prior to June 30, 1994. After all, future claims would be given only the two or three-year limitation period in the Portal-to-Portal Act, which is consistent with the rights afforded to the private sector. What Congress changed in the Amended Section 640 was who (of those who filed prior to June 30, 1994) could take advantage of the extended limitation period. While deciding to allow the six-year limitation period to remain temporarily, Congress apparently decided to limit such claims to those workers who had not received overtime compensation for the same period under another provision of law and to exclude any claims involving time spent commuting. There is nothing improper about this. In fact, with regard to the first limitation, it is difficult to imagine any purpose more

legitimate than preventing workers from receiving double overtime compensation.

As for the limitation concerning commuting, this is a closer question, especially because there is nothing specific in the legislative history that might offer guidance. Nonetheless, consistent with the reasoning thus far, the Court finds the purpose of this provision to be legitimate. As already noted, Rep. Lightfoot gave as reasons for passage of the amendment "cost" and "fairness." But Rep. Lightfoot also spoke of equating the rights enjoyed by federal employees to those of private sector employees. Under 29 U.S.C. § 254(a) and (b) (1947), employers are not generally liable for overtime compensation for commuting absent a contract or custom. This provision has been extended to include federal workers, as well. *Carter v. Panama Canal Co.*, 463 F.2d 1289 (D.C.Cir.1972), *cert. denied* 409 U.S. 1012, 93 S.Ct. 441, 34 L.Ed.2d 306. In any event, private sector employees are limited by the two or three-year statute of limitations for such actions, as would be the Plaintiffs here were it not for the original Section 640. 29 U.S.C. § 255 (1947). To the extent that Congress acted to equate federal workers' rights with those of the private sector concerning overtime claims for commuting, the Court finds amended Section 640 to have a legitimate purpose. Further, the rational means was to enact amended Section 640.

Accordingly, the Court concludes that Congress, by enacting amended Section 640, had a legitimate purpose which was furthered by a rational means.

D. ***Taking without Compensation***

Plaintiffs also argue that their unpaid FLSA overtime was property that was taken without just compensation in violation of the Fifth Amendment of the Constitution. The Court disagrees.

The test for determining whether a compensable taking has occurred is set forth in *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 224-25, 106 S.Ct. 1018, 1026, 89 L.Ed.2d 166 (1986), in which the Supreme Court identified the following three factors: 1) the economic impact of the regulation on the claimant, 2) the extent to which the regulation has interfered with distinct investment-backed expectations, and 3) the character of the governmental action.

Concerning the first factor, the Court does not find that Plaintiffs will suffer a great economic impact. It is true that the total payout for Plaintiffs' claims would run into the millions of dollars and some of the claims go back as far as twelve years. This case, however, is not a class action. The "millions of dollars" figure does not, therefore, inure to the group as a whole. Rather, any impact must be measured against the individual claims. Plaintiffs have failed to show how any one of the Plaintiffs would suffer a greater economic impact than merely losing an entitlement that only in recent years had been discovered. Moreover, insofar as amended Section 640 prevents the Plaintiffs from receiving overtime compensation under FLSA when such compensation was paid under another provision of law, there can be little, if any, economic impact to the Plaintiffs.

Similarly, under the second prong, amended Section 640 does not unduly interfere with a distinct investment-backed expectation. Although the hours worked by the Plaintiffs are tantamount to an investment, there was no legitimate expectation to a six-year limitation period. As recounted previously, the proper limitation period for FLSA claims is two or three years as stated by the Portal-to-Portal Act. 29 U.S.C. § 255(a) (1947). While Congress extended the limitation period for some individuals in some instances, it could also limit the application of this extension and did so.

Plaintiffs' only legitimate expectation was to a two or three-year limitation period.

The final factor concerns the character of the action. The Court finds that this factor, for the most part, is subsumed by the above discussion concerning due process and the legitimacy of Congress's purpose in passing amended Section 640. As the Supreme Court stated in *Connolly*: "The purpose of forbidding uncompensated takings of private property for public use is 'to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. at 227, 106 S.Ct. at 1027, *quoting Armstrong v. United States*, 364 U.S. 40, 49, 80 S.Ct. 1563, 1569, 4 L.Ed.2d 1554 (1960). Congress apparently decided that it was unfair for the public to bear the burden of a mistake made by GAO. The legislative history of amended Section 640 expressly mentions fairness as a reason for the legislation. 141 Cong.Rec. H12371-02, H12376 (Nov. 15, 1995). Accordingly, the Court finds that the nature of the action taken by Congress is not inconsistent with the purpose behind the takings clause.

E. ***Equal Protection***

Plaintiffs also argue that they were denied equal protection of the laws guaranteed by the Fifth Amendment to the Constitution. Essentially, Plaintiffs allege that in the intervening time between the passage of the original Section 640 and the amended Section 640, several claimants had their claims favorably processed ("Kinsley claimants"), while Plaintiffs' claims were not acted upon during that same period.

The equal protection clause is meant to protect persons similarly situated from receiving disparate treatment under applicable laws. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439, 105 S.Ct. 3249, 3254, 87 L.Ed.2d

313 (1985). Where such disparate treatment does occur, there must be a rational basis. *Heller v. Doe*, 509 U.S. 312, 318, 113 S.Ct. 2637, 2641, 125 L.Ed.2d 257 (1993). Here, the Court does not reach the rational basis question because the Court concludes that Plaintiffs and the Kinsley claimants were not similarly situated.

Although the Kinsley claimants and the Plaintiffs each had claims that were received by GAO during the interim period between passage of the original section 640 and the amended Section 640, they arrived in very different stages of development. The Kinsley claimants had received rulings on their claims by the Office of Personnel Management (OPM) in 1993, which included a fully developed record of factual findings. *Kinsley*, No. B-235609.2, 1995 WL 9720, 2 (Comp. Gen. Jan. 9, 1995). Plaintiffs, however, had not received administrative rulings on their claims when they first approached GAO following enactment of the original Section 640 and there does not appear to have been a factual record upon which GAO could even have reviewed the claims. While the Plaintiffs, as directed, brought their claims to the employing agencies, the claims for the Kinsley claimants were resolved pursuant to the newly enacted original Section 640 in January 1995. *Id.* By the time Plaintiffs received decisions from the individual agencies (March 10 through May 12, 1995), however, the Treasury Department was already lobbying Congress to repeal original Section 640. (Bernstein Decl., Exs. 11, 12).

Whether such activity is a proper reason to delay resolution of pending claims is a difficult question, but one the Court does not have to answer. Rather, the Court is satisfied that Plaintiffs did not have a sufficiently developed factual record for their claims and, given the sheer number of Plaintiffs in this case, would not have had one by the time

amended Section 640 was enacted in November 1995.[5] The Court, therefore, concludes that Plaintiffs were not denied equal protection of the laws because they were not similarly situated with those whom Plaintiffs complain were given preferential treatment.

F. ***Administrative Procedures Act ("APA")***

In light of the Court's conclusions thus far, Plaintiffs' remaining claims are moot. Plaintiffs allege that the GAO and the employing agencies violated the APA by following the *Ford* decision and again when the GAO failed to resolve Plaintiffs' claims in the interim period between passage of original Section 640 and amended Section 640. Plaintiffs request that the Court declare the *Ford* decision invalid and order the GAO to apply a six-year statute of limitations to all of their claims.

Plaintiffs' claims in this regard depend upon the argued invalidity of amended Section 640. The Court has determined that amended Section 640 passes constitutional muster. Moreover, insofar as Congress impliedly adopted the two or three-year limitation period (and which this Court finds otherwise to be applicable) for all claims that do not fall under amended Section 640, the *Ford* and the *Atkinson* decisions are valid. Finally, the Court cannot in this case "compel agency action unlawfully withheld or unreasonably delayed" under the APA, 5 U.S.C. § 706(1), because the delay complained of has been mooted by enactment of amended Section 640.[6]

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[5] Defendants argue that because of the number of claimants and the enormity of the task of determining their substantive eligibility for backpay, any final decision was months, if not years, away. Def.Mot.Sum.J. at 46.

[6] Of course, the Court expects that those Plaintiffs who meet the criteria of amended Section 640 will have their claims resolved in a timely fashion.

III. *CONCLUSION*

For the reasons stated above, the Court concludes that Congress did not act unconstitutionally by enacting amended Section 640, nor did the GAO violate equal protection guarantees in processing other claims. Finally, in light of these conclusions, Plaintiffs' remaining claims pursuant to the APA are moot. Judgment, therefore, is entered for the Defendants.

U.S. CONST. AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

1995 TREASURY, POSTAL SERVICE AND GENERAL GOVERNMENT APPROPRIATIONS ACT
Pub. L. No. 103-329, 108 Stat. 2382, § 640 (1994)

In the administration of section 3702 of title 31, United States Code, the Comptroller General of the United States shall apply a 6-year statute of limitations to any claim of a Federal employee under the Fair Labor Standards Act of 1938 (U.S.C. 201 et seq.) for claims filed before June 30, 1994.

Pub. L. No. 104-52, 109 Stat. 468 (1995)
TITLE I--DEPARTMENT OF THE TREASURY
DEPARTMENTAL OFFICES
SALARIES AND EXPENSES

For necessary expenses of the Departmental Offices including operation and maintenance of the Treasury Building and Annex; hire of passenger motor vehicles; maintenance, repairs, and improvements of, and purchase of commercial insurance policies for, real properties leased or owned overseas, when necessary for the performance of

official business; not to exceed $2,900,000 for official travel expenses; not to exceed $2,950,000 to remain available until expended, shall be available for information technology modernization requirements; not to exceed $150,000 for official reception and representation expenses; not to exceed $258,000 for unforeseen emergencies of a confidential nature, to be allocated and expended under the direction of the Secretary of the Treasury and to be accounted for solely on his certificate; $105,929,000, of which up to $500,000 shall be available to reimburse the District of Columbia Metropolitan Police Department for personnel costs incurred by the Metropolitan Police Department between May 19, 1995 and September 30, 1995 as a result of the closing to vehicular traffic of Pennsylvania Avenue Northwest and other streets in the vicinity of the White House: Provided, That Section 640 of Title VI of the Treasury Postal Service and General Government Appropriations Act, 1995 (Public Law 103-329, 108 Stat. 2432), is amended by adding at the end thereof the following new sentence: "This section shall not apply to any claim where the employee has received any compensation for overtime hours worked during the period covered by the claim under any other provision of law, including, but not limited to, 5 U.S.C. 5545(c), or to any claim for compensation for time spent commuting between the employee's residence and duty station."

Supreme Court, U.S
FILED
JUL 6 - 2005
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(4) (3)

Nos. 04-1225 and 04-1226

In the Supreme Court of the United States

STEPHEN S. ADAMS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

STEPHEN S. ADAMS, ET AL., PETITIONERS

v.

DAVID M. WALKER, COMPTROLLER GENERAL OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

An action to enforce a cause of action under the Fair Labor Standards Act of 1938 (FLSA) generally must be commenced no later than two years after the cause of action accrued. In addition to their judicial remedies, federal employees with FLSA claims may invoke an administrative claims settlement process provided under the Barring Act, 31 U.S.C. 3702 (2000 & Supp. II 2002). In 1994, Congress retroactively extended the limitations period under the Barring Act from two or three years to six years for FLSA claims of federal employees that had been filed before June 30, 1994. Treasury, Postal Service, and General Government Appropriations Act, 1995, Pub. L. No. 103-329, § 640, 108 Stat. 2432. One year later, Congress amended Section 640 to provide that the retroactive extension "shall not apply to any claim where the employee has received any compensation for overtime hours worked during the period covered by the claim under any other provision of law." Treasury, Postal Service, and General Government Appropriations Act, 1996, Pub. L. No. 104-52, Tit. I, 109 Stat. 468-469.

The questions presented are as follows:

1. Whether the 1995 legislation violates the Takings Clause.

2. Whether the 1995 legislation violates the Due Process Clause.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit in Nos. 04-1225 and 04-1226 (04-1225 Pet. App. 54a-64a; 04-1226 Pet. App. 1a-11a) is reported at 154 F.3d 420. The memorandum and order of the district court in Nos. 04-1225 and 04-1226 (04-1225

Pet. App. 74a-90a; 04-1226 Pet. App. 12a-30a) is reported at 946 F. Supp. 37.

The opinion of the United States Court of Appeals for the Federal Circuit in No. 04-1225 (04-1225 Pet. App. 1a-24a) is reported at 391 F.3d 1212. The opinion of the Court of Federal Claims in No. 04-1225 (04-1225 Pet. App. 25a-51a) is not yet reported, but is available on Westlaw at 2003 WL 22339164.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on August 28, 1998. Petitions for rehearing were denied on November 9, 1998. The petition for a writ of certiorari was denied on June 7, 1999.

This case was then transferred to the Court of Federal Claims, from which an appeal was taken to the United States Court of Appeals for the Federal Circuit. The Federal Circuit entered its judgment on December 9, 2004. The petitions for a writ of certiorari were filed on March 9, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Subject to certain occupational and other exemptions, the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, entitles employees to overtime pay (usually based on hours worked in excess of a 40-hour work week) at the rate of one and one-half times an employee's normal hourly compensation. 29 U.S.C. 207(a), 213(a)(1). Employees may bring suit for unpaid FLSA overtime compensation in "any court of competent jurisdiction." 29 U.S.C. 216(b). In the Portal-to-Portal Act of 1947, 29 U.S.C. 251 *et seq.*, Congress added the following statute of limitations to the FLSA:

> Any action commenced * * * to enforce any cause of action for * * * unpaid overtime compensation * * * under the Fair Labor Standards Act * * *
>
> (a) * * * may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued.

29 U.S.C. 255(a).

When the FLSA and the Portal-to-Portal Act were enacted, federal employees were expressly excluded from the FLSA's coverage. *Carter* v. *Panama Canal Co.*, 463 F.2d 1289, 1294 & n.10 (D.C. Cir.), cert. denied, 409 U.S. 1012 (1972). In 1974, the FLSA was amended to cover federal employees, subject to the statute's general exemptions (*e.g.*, 29 U.S.C. 213) for executive, administrative, and professional employees, among others. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 6, 88 Stat. 59 (29 U.S.C. 203(e)(2)(A)).

In addition to their judicial remedies, federal employees may invoke the general administrative claims settlement process provided under the Barring Act, 31 U.S.C. 3702 (2000 & Supp. II 2002). The Barring Act applies to a wide range of monetary claims against the United States. When the claims at issue here were filed, it authorized the Comptroller General to settle claims "received * * * within 6 years after the claim accrues except * * * as provided in this chapter or another law." 31 U.S.C. 3702(b)(1)(A). Non-federal employees may not invoke the Barring Act's administrative process for their FLSA claims because they do not have claims against the government.

2. a. Petitioners are current and former federal law enforcement officers who seek overtime compensation under the FLSA for periods between 1984 and 1995. In suits filed between February 1990 and December 1995 in the Court of Federal Claims (CFC), petitioners claimed that their employing agencies had incorrectly classified their positions as exempt from the overtime provisions of the FLSA. Each petitioner also lodged an administrative claim with the General Accounting Office (GAO) under the Barring Act.

In October 1992, the CFC held that certain grades of employees were not exempt from the FLSA and had therefore been entitled to overtime pay. *Adams* v. *United States*, 27 Fed. Cl. 5 (1992). In March 1994, petitioners entered into settlement agreements with the United States that gave those employees overtime pay and interest for the two-year period before each suit was filed, without prejudice to their right to pursue administrative remedies. 04-1225 Pet. App. 54a-55a. Returning to GAO, petitioners sought a total of six years of back pay under the FLSA —four years beyond what they had obtained in the CFC settlement, and four years beyond what the FLSA itself provides, see 29 U.S.C. 255(a).

b. When GAO had first confronted the question in 1978, it concluded that the six-year period set forth in the Barring Act, 31 U.S.C. 3702(b)(1)(A), applies to administrative proceedings to recover overtime pay under the FLSA. *In re Transportation Sys. Ctr.*, 57 Comp. Gen. 441 (1978). By the time petitioners' administrative claims were pending, however, GAO had begun actively reconsidering that ruling. In *In re Ford*, 73 Comp. Gen. 157 (1994), GAO overruled *Transportation Systems* and determined that the relevant limitations period is the one set forth in the FLSA itself, as amended by the Portal-to-Portal Act.

GAO reasoned that "[w]hen a statute creates a right that did not exist at common law and restricts the time to enforce it, expiration of the time limit not only bars the remedy but extinguishes the underlying rights and liabilities of the parties." *Ford*, 73 Comp. Gen. at 160-161. Thus, GAO concluded, "a time limitation imposed on a statutorily created judicial cause of action will apply to administrative proceedings to adjudicate the same claims absent a specific provision to the contrary." *Id.* at 161. "[L]egislative determinations to limit the extent of a party's exposure to liability or to discourage claims involving stale facts or documentation problems are no less relevant to administrative than to judicial proceedings." *Ibid.*

GAO further explained that when Congress extended FLSA coverage to federal employees, "no congressional intent was manifested in the amending language or its underlying legislative history that federal employees would be accorded a more liberal limitations period than employees in the private sector." 73 Comp. Gen. at 160 (quoting *Hickman* v. *United States*, 10 Cl. Ct. 550, 552 (1986)). Construing the Barring Act to extend the limitations period for administrative back pay claims against the government, GAO concluded, would disserve congressional intent by "creat[ing] disparate treatment * * * between federal employees and private sector employees" who have no administrative alternative to filing a court suit for back pay. *Id.* at 161.

c. Petitioners and others persuaded Congress to grant relief from the effect of the *Ford* decision on some already-pending FLSA administrative claims. In Section 640 of the Treasury, Postal Service and General Government Appropriations Act, 1995, enacted on September 30, 1994, Congress provided:

> In the administration of section 3702 of title 31, United States Code, the Comptroller General of the United States shall apply a 6-year statute of limitations to any claim of a Federal employee under the Fair Labor Standards Act of 1938 (29 U.S.C. 201 *et seq.*) for claims filed before June 30, 1994.

Pub. L. No. 103-329, § 640, 108 Stat. 2432.

Invoking Section 640, petitioners contacted GAO seeking resolution of their claims. GAO reminded petitioners that their claims had to be processed first through their employing agencies. See 4 C.F.R. 31.4 (1994). Petitioners brought their claims to the attention of the employing agencies, which denied them on the ground that Section 640 by its terms authorized only the Comptroller General to apply a six-year statute of limitations. 04-1225 Pet. App. 58a.

In 1995, petitioners appealed those agency determinations to GAO. By then, however, Congress was considering repeal of Section 640. On November 19, 1995, Congress amended Section 640 as follows:

> This section shall not apply to any claim where the employee has received any compensation for overtime hours worked during the period covered by the claim under any other provision of law * * *, or to any claim for compensation for time spent commuting between the employee's residence and duty station.

Treasury, Postal Service, and General Government Appropriations Act, 1996, Pub. L. No. 104-52, 109 Stat. 468-469. The sponsor of the amendment explained that GAO's 1978 decision to apply a six-year limitations period had been "incorrect [because] the law states that everyone would only be entitled to two years" of back pay for FLSA violations. 141 Cong. Rec. 32,597 (1995) (remarks of Rep.

Lightfoot). He added that, although in *Ford* the GAO had "corrected its mistake," the 1994 legislation—which required GAO to allow up to six years of back pay for claims that had already been filed by June 30, 1994—would cost the government as much as $460 million, "nearly the entire Secret Service budget." *Ibid.* "The conferees were faced with a choice—either pay hundreds of millions for work done many years ago and fire four or five thousand employees[,] or give the Federal workers the same rights as their private sector counterparts." *Ibid.* Therefore, "we included language providing for the same treatment for public and private workers * * * not just because [to do otherwise] costs a lot of money, but because it is fair." *Ibid.*

GAO applied amended Section 640 in the pending case in which petitioners had intervened. *In re Atkinson*, No. B-256938, 1996 WL 31212 (Comp. Gen. Jan. 29, 1996). GAO then advised petitioners in March 1996 that it would similarly adjudicate their FLSA claims in accordance with amended Section 640.

3. Petitioners brought this action in the district court in October 1995—before passage of the amendment to Section 640 and before GAO's decision in *Atkinson* —seeking mandamus, injunctive, and declaratory relief requiring GAO to apply a six-year statute of limitations to their claims notwithstanding *Ford*. 04-1225 Pet. App. 60a. In supplemental complaints, petitioners added challenges to amended Section 640 and *Atkinson*. *Ibid.*

a. The district court granted the government's motion for summary judgment. 04-1225 Pet. App. 74a-90a. The court held that petitioners' pending administrative claims did not constitute separate "property" rights entitling them to demand application of the pre-*Ford* interpretation of the law because a cause of action is "inchoate, and affords no definite or enforceable property right until reduced to final

judgment." *Id.* at 79a (quoting *Austin* v. *City of Bisbee*, 855 F.2d 1429, 1436 (9th Cir. 1988)). The court also held that petitioners had no enforceable property interest in their "earned but unpaid FLSA overtime compensation." *Id.* at 80a. "[T]he FLSA," it explained, "is a creature of statute and can only confer benefits contained within the statute," and "there was nothing in the legislative record [of the FLSA] indicating congressional intent to impart a more liberal limitations period to federal employees than to employees in the private sector." *Id.* at 80a, 81a. Indeed, "[u]ntil the passage of Section 640 in the 1995 Act, GAO had no authority to permit a 6 year limitation period for FLSA claims," and its past practice of doing so was simply "wrong." *Id.* at 81a.

The district court added that those petitioners who had filed administrative claims before June 30, 1994 had derived "property interests in their unpaid overtime compensation" from the enactment of Section 640. 04-1225 Pet. App. 82a. The court concluded, however, that those petitioners are not entitled to relief, because such interests could be extinguished consistent with the Due Process Clause by economic legislation having "a legitimate legislative purpose furthered by rational means." *Ibid.* (quoting *General Motors Corp.* v. *Romein*, 503 U.S. 181, 191 (1992)). The court found that the amendment to Section 640 met that standard. *Id.* at 82a-83a.

For similar reasons, the district court held that petitioners had identified no unconstitutional taking. 04-1225 Pet. App. 85a-87a.

b. Except on the takings issue, the D.C. Circuit affirmed "substantially for the reasons stated in the [district] court's thorough and well-reasoned opinion." 04-1225 Pet. App. 60a. The court of appeals determined that "the usual remedy for unconstitutional takings is a suit for

money damage (*i.e.*, the 'just compensation' that the Constitution assures) either under the Tucker Act in the CFC, 28 U.S.C. 1491," or if the amount in controversy is less than $10,000, in the district court under the Little Tucker Act, 28 U.S.C. 1346(a)(2). 04-1225 Pet. App. 63a (citations and footnote omitted). Either way, the D.C. Circuit concluded, exclusive appellate jurisdiction would lie in the Federal Circuit. *Ibid.*

This Court denied petitioners' petition for a writ of certiorari. 526 U.S. 1158 (1999).

4. a. On remand, the district court transferred this case to the CFC, which dismissed the takings claims. 04-1225 Pet. App. 25a-51a, 52a. The CFC concluded that govern-mental obligations to pay money pursuant to a statute do not give rise to a protected property interest for purposes of the Takings Clause. *Id.* at 26a, 36a-48a. Because "[a]ll the plaintiffs have identified is a run-of-the-mill claim for liability," their "claim does not fall under the safeguard of the Takings Clause, but is at best a due process claim to secure an alleged entitlement," a claim that the D.C. Circuit had rejected. *Id.* at 41a, 48a.

The CFC likewise rejected petitioners' alternative argument that the amendments to Section 640 were a taking of their cause of action under the FLSA. 04-1225 Pet. App. 48a-50a. "While it is true that in certain circumstances abolition of a cause-of-action can rise to a level of an unconstitutional taking * * * it is equally true that [petitioners'] cause-of-action must secure a cognizable 'legally protected interest.'" *Id.* at 50a. Here, the court reasoned, petitioners' claim for overtime payment is not a property right protected by the Takings Clause. *Ibid.*

b. The Federal Circuit affirmed. 04-1225 Pet. App. 1a-24a. The court rejected petitioners' contention that they own a Fifth Amendment property interest under the

FLSA, stating that petitioners "confuse a property right cognizable under the Takings Clause of the Fifth Amendment with a due process right to payment of a monetary entitlement under a compensation statute." *Id.* at 12a. The court likewise rejected the argument that petitioners' right to FLSA overtime payment became a vested contractual right once the work was completed, noting that the terms of petitioners' employment are governed by statute rather than by any express or implied contract. *Id.* at 14a. Nor, the court reasoned, is the government's statutory obligation to pay overtime a "debt" evidenced in a legal instrument; petitioners "have nothing more than a bald allegation that they are owed underpaid overtime compensation by the Government." *Id.* at 17a. The court also reaffirmed its holding in *Commonwealth Edison Co.* v. *United States*, 271 F.3d 1327 (Fed. Cir. 2001) (en banc), cert. denied, 535 U.S. 1096 (2002), that the mere imposition of an obligation to pay money does not give rise to a takings claim. 04-1225 Pet. App. 19a-22a.

Finally, the Federal Circuit rejected petitioners' claim that Congress's amendment of Section 640 in 1995 effected a *per se* taking of their GAO administrative claim. The court explained that a cause of action may constitute property for purposes of the Takings Clause only when "the cause of action protects a legally-cognizable property interest." 04-1225 Pet. App. 23a. Petitioners "have not cited any precedent finding such a property interest in a claim of Government liability before an administrative agency." *Ibid.*

DISCUSSION

Petitioners assert (04-1225 Pet. 12-28; 04-1226 Pet. 14-25) that the Federal Circuit erred in holding that the 1995 legislation does not violate the Takings Clause, and that the

D.C. Circuit erred in holding that the legislation does not violate the Due Process Clause. The courts of appeals' decisions are correct and do not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. The Takings Clause provides that "private property" shall not "be taken for public use, without just compensation." U.S. Const. Amend. V. Thus, a fundamental precondition to any takings claim is the taking of "property." See, *e.g.*, *United States* v. *Security Indus. Bank*, 459 U.S. 70, 75 (1982). Such "[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Webb's Fabulous Pharmacies* v. *Beckwith*, 449 U.S. 155, 161 (1980) (quoting *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972)).

The Federal Circuit correctly held that petitioners have no cognizable property interest for purposes of the Takings Clause. 04-1225 Pet. App. 10a-24a. After petitioners performed the work at issue, and after petitioners filed their administrative and judicial claims, Congress retroactively extended the statute of limitations applicable to their administrative claims from two to six years. Treasury, Postal Service and General Government Appropriations Act, 1995, Pub. L. No. 103-329, § 640, 108 Stat. 2432. The following year, Congress retroactively repealed that retroactive extension as applied to employees who had already received some form of overtime compensation for the work at issue. Treasury, Postal Service, and General Government Appropriations Act, 1996, Pub. L. No. 104-52, 109 Stat. 468-469. Because petitioners did not possess a property right in the retroactively extended statute of limitations for administrative claims, the withdrawal of that

extension did not take any of their property for purposes of the Takings Clause.

a. Although petitioners argue correctly that a contract with the United States can create a property right, see 04-1225 Pet. 13 (citing *Perry* v. *United States*, 294 U.S. 330 (1935); *Lynch* v. *United States*, 292 U.S. 571 (1934)), petitioners have no relevant contract rights. Petitioners contend (04-1225 Pet. 12) that they have a contractual right to their "earned wages," but that contention is both wrong and irrelevant. It is wrong because the employment relationship between the federal government and its employees is governed by statute, not contract. And it is irrelevant because Congress did not divest petitioners of their right to earned wages; instead, it merely reinstated the same statutory limitations period for administrative claims that had been in effect at the time that petitioners performed the relevant work and filed their claims.

i. It is well settled that "federal employment does not rest on contract in the private sector sense." *Karahalios* v. *National Fed'n of Fed. Employees, Local 1263*, 489 U.S. 527, 535 (1989). As the Federal Circuit explained:

> [F]ederal workers serve by appointment, and their rights are therefore a matter of legal status even where compacts are made. In other words, their entitlement to pay and other benefits must be determined by reference to the statutes and regulations governing [compensation], rather than to ordinary contract principles. * * * Applying these doctrines, courts have consistently refused to give effect to government-fostered expectations that, had they arisen in the private sector, might well have formed the basis for a contract or an estoppel. These cases have involved, *inter alia*, promises of appointment to a particular grade or step level, promises of promotion upon satis-

> faction of certain conditions, promises of extra compensation in exchange for extra services, and promises of other employment benefits.

04-1225 Pet. App. 14a-15a (quoting *Kizas* v. *Webster*, 707 F.2d 524, 535 (D.C. Cir. 1983), cert. denied, 464 U.S. 1042 (1984)); see, *e.g.*, *Schism* v. *United States*, 316 F.3d 1259, 1268, 1271, 1275-1275 (Fed. Cir. 2002) (en banc), cert. denied, 539 U.S. 910 (2003); *Kizas*, 707 F.2d at 535 (citing numerous cases). Instead of "transform[ing] the basic relationship between the United States and its" employees, as petitioners claim (04-1225 Pet. 12), the decision below therefore rests on established principles concerning that relationship. As federal employees, petitioners can have no contractual right to FLSA overtime compensation.

Indeed, petitioners can point to *no* contractual document that could even arguably give rise to such a right. As the Federal Circuit noted, "[t]he only legal instrument, the Form 50, rather than acknowledging [petitioners'] right to be paid for overtime at the rate specified in the FLSA, instead indicated that the FLSA did *not* apply to them." 04-1225 Pet. App. 17a (emphasis added).

Petitioners rely heavily (04-1225 Pet. 15) on *Fisk* v. *Jefferson Police Jury*, 116 U.S. 131 (1885), which held that a local government had violated the Contracts Clause of the United States Constitution by not paying a district attorney money that he was concededly owed for his services. The Court reasoned that an "implied contract" arose between the locality and the employee because "[n]ot only were the services requested and rendered, and the obligation to pay for them perfect, but the measure of compensation was also fixed by the previous order of the police jury." *Id.* at 134.

Petitioners' reliance on *Fisk* is misplaced for a number of reasons. As the court of appeals noted (04-1225 Pet. App. 14a), *Fisk* involved a local government employee's rights

under the Contracts Clause, not a federal employee's rights under the Takings Clause. Because the federal employment relationship is governed by statute, not contract, principles governing implied-in-fact contracts apply differently to the federal government. See pp. 12-13, *supra*; *Schism*, 316 F.3d at 1274; *Kizas*, 707 F.2d at 535 & nn.51-54 (citing cases).

Moreover, in *Fisk*, liability and damages had been determined, and the only question was whether the Contracts Clause applied and required the locality to levy a tax to pay the wages. 116 U.S. at 134-135. In contrast, the government has always disputed petitioners' right to FLSA compensation, and petitioners' claims still have not been resolved. Especially in this posture, there is no basis for converting petitioners' statutory claims for compensation into constitutional takings claims.

United States v. *Larionoff*, 431 U.S. 864 (1977), is inapposite for similar reasons. *Larinoff* considered the validity, under a statute, of administrative regulations that interpreted that statute to deny a re-enlistment bonus to a service member even though the bonus had been in effect at the time the service member signed a written re-enlistment agreement. *Id.* at 873. As the Federal Circuit and the CFC both noted, *Larionoff* is inapposite because it involved the interpretation of a statutory entitlement to compensation, not the assertion of a claim under the Takings Clause. 04-1225 Pet. App. 12a, 45a. Although *Larinoff* also noted that "serious constitutional questions would be presented" by a statute that deprived a service member of pay for services already performed (431 U.S. at 879), that statement is hardly a definitive resolution of the constitutional issue in this case. Indeed, the Court did not even refer to the Takings Clause. And like *Fink*, *Larinoff*

addressed a specific, known liability that turned only on the statutory issue addressed by the Court.

ii. In any event, while *Fink* and *Larinoff* addressed employees' rights to *compensation*, this case involves a *statute of limitations* for administrative claims. Although petitioners repeatedly contend (*e.g.*, 04-1225 Pet. 2-3; 04-1226 Pet. 25) that Congress repudiated its debts, and deprived them of compensation for work already performed, it did no such thing. Congress did not repeal the FLSA. Nor did it impair in any way petitioners' ability to pursue judicial remedies. Indeed, petitioners have pursued their judicial remedies with no interference from Congress. See generally p. 4, *supra*.

Instead, this case involves only a statute of limitations for an additional administrative claim avenue open only to government employees, and even that statutory limitations period is the same now as it was when petitioners performed the relevant work and filed their claims. It bears emphasis that the sole basis for petitioners' takings claim is that *after* petitioners performed the work at issue, and *after* petitioners filed their judicial and administrative claims, Congress first enacted a retroactive extension of the limitations period for administrative claims, and then enacted a partial repeal of that retroactive extension for employees who had already received overtime compensation for the work at issue. See, *e.g.*, 04-1225 Pet. 3 (relying on the amendment to Section 640). Taken together, those two statutes had no effect on petitioners' primary conduct and left petitioners no worse off (and in some respects better off) than when they performed the relevant work and filed their claims.[1]

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[1] Although petitioners challenged GAO's reconsideration of the appropriate limitations period in their prior petition for a writ of

Thus, even if petitioners had somehow obtained vested contract rights at the time they completed the relevant work, those vested rights would not have included Section 640's *subsequent* extension of the limitations period for administrative claims. That statute had not yet been enacted, and there are no vested rights in subsequently-conferred windfalls. In that respect, Section 640 is indistinguishable from other government benefits, such as social security benefits, that do not create vested property rights and are therefore subject to legislative repeal. See, *e.g.*, *Flemming* v. *Nestor*, 363 U.S. 603, 608 (1960) (holding that termination of social security benefits did not deprive petitioner of an accrued property interest).

b. i. In addition to asserting a contractual entitlement, petitioners contend (04-1225 Pet. 18-23) that a statutory right to compensation can give rise to a cognizable property interest. That contention fails because nothing in the statutory text evinces an intent to confer property rights. "For many decades, this Court has maintained that absent some clear indication that the legislature intends to bind itself contractually, the presumption is that 'a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise.'" *National R.R. Passenger Corp.* v. *Atchison, Topeka & Santa Fe Ry.*, 470 U.S. 451, 465-466 (1985) (quoting *Dodge* v. *Board of Educ.*, 302 U.S. 74, 79

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certiorari in this case (see Gov't Br. in Opp. at 22-23 & n.12, *Adams* v. *Hinchman*, No. 98-1265), the current petitions rely only on *Congress's* changes to the administrative statute of limitations. See, *e.g.*, 04-1225 Pet. 3. In any event, GAO's overruling of its prior interpretation of the Barring Act could not give rise to a takings claim because petitioners have no property interest in any particular construction of a statute. See pp. 20-21, *infra*. Moreover, GAO's current interpretation is the correct one. See 04-1225 Pet. App. 81a; *id.* at 61a; p. 5, *supra*.

(1937)). In determining whether a statute "clearly and unequivocally" overcomes that presumption, "it is of first importance to examine the language of the statute." *Id.* at 466 (quoting *Dodge*, 302 U.S. at 78).

Significantly, petitioners make no attempt to identify *any* language in *any* statute that could overcome that presumption in this case. Although petitioners base their claims on the partial repeal of Section 640, nothing in Section 640 expresses an intent by Congress to bind itself by conferring vested property rights on petitioners. Instead, that statute simply directed the Comptroller General to apply a six-year statute of limitations to certain administrative claims. See p. 6, *supra*.

ii. Instead of contesting that point, petitioners criticize various aspects of the court of appeals' reasoning. Those criticisms are misplaced. Petitioners argue (04-1225 Pet. 22-23) that the Federal Circuit erred in *another* case, *Commonwealth Edison Co.* v. *United States*, 271 F.3d 1327, 1340 (2001) (en banc), cert. denied, 535 U.S. 1096 (2002), which held that "the mere imposition of an obligation to pay money * * * does not give rise to a claim under the takings Clause of the Fifth Amendment." That holding is correct. As this Court explained in *United States* v. *Sperry Corp.*, 493 U.S. 52, 62 n.9 (1989), "[u]nlike real or personal property, money is fungible," and taxes and other government exactions might be considered takings if the mere imposition of an obligation to pay money, without more, implicated the Takings Clause.

As the court of appeals noted (04-1225 Pet. App. 19a-20a), a majority of this Court reiterated that conclusion in *Eastern Enterprises* v. *Apfel*, 524 U.S. 498 (1998), by determining that a mere obligation to pay an undifferentiated amount of money, not drawn from a specific identifiable fund, is not property for purposes of the Takings

Clause. *Id.* at 540-542 (Kennedy, J., concurring in judgment and dissenting in part); *id.* at 554-557 (Breyer, J., dissenting).[2] Although petitioners fault the Federal Circuit for "[t]allying votes from concurring and dissenting opinions" (04-1225 Pet. 22), that misses the point. *Commonwealth Edison* did not treat *Eastern Enterprises* as a change in the law; nor did it rely exclusively on *Eastern Enterprises*. Instead, the Federal Circuit also relied on this Court's decision in *Sperry*, *supra*, and the Federal Circuit's own decision in *Atlas Corp.* v. *United States*, 895 F.2d 745, 756, cert. denied, 498 U.S. 811 (1990), which had held that "[r]equiring money to be spent is not a taking of property." *Commonwealth Edison*, 271 F.3d at 1340.

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[2] The takings issue in this case is not distinguishable from *Eastern Enterprises* on the basis, asserted by petitioners (04-1225 Pet. 23), that *Eastern Enterprises* involved a private party's obligation to another private party, whereas this case involves an obligation to pay money by the government. Justice Kennedy expressly rejected the relevance of that point in *Eastern Enterprises*: "The circumstance that the statute does not take money for the Government but instead makes it payable to third persons is not a factor I rely upon to show the lack of a taking." 524 U.S. at 543 (Kennedy, J., concurring in judgment and dissenting in part). The four other Justices who agreed that no valid taking claim was raised in *Eastern Enterprises* did remark that the case involved an obligation to pay money to a private party. See *id.* at 555 (Breyer, J., dissenting). They also observed, however, that one of the reasons that the monetary obligation in *Eastern Enterprises* should not be conceptualized as a taking is that such a characterization might lead to the conclusion that all taxes could be considered takings. See *id.* at 556 (Breyer, J., dissenting).

Nor is the relevance of *Eastern Enterprises* limited to regulatory takings, as petitioners suggest (04-1225 Pet. 20-21). The relevant portions of *Eastern Enterprises* address the question whether the plaintiff had a cognizable property interest—a threshold issue in *any* takings case. See 524 U.S. at 540-542 (Kennedy, J., concurring in judgment and dissenting in part); *id.* at 554-556 (Breyer, J., dissenting); p. 11, *supra*.

There is nothing wrong with a lower court following *both* past precedent *and* the expressed views of a majority of the Members of this Court. In any event, this Court denied certiorari in *Commonwealth Edison* (535 U.S. 1096 (2002)), and further review of that decision is no more warranted in this case than in that one. See generally Gov't Br. in Opp. at 13-15, *Sacramento Mun. Util. Dist.* v. *United States*, Nos. 01-1020, 01-1155, 01-1398 & 01-1411.

Indeed, petitioners simply misread the Federal Circuit's decision in contending (04-1225 Pet. 24) that the court held that debts are not property unless they relate to a specific "fund of money." The Federal Circuit expressly stated that *contractual* obligations are ordinarily property. 04-1225 Pet. App. 15a-16a. In the discussion relied on by petitioners, the court held that the mere imposition of an obligation to pay money does not constitute a taking of a specific interest in property, and then recognized, as had a majority of this Court in *Eastern Enterprises*, that nonetheless the seizure of a specific fund of money can constitute a taking if the fund constitutes a specific interest in property. *Id.* at 21a; *Eastern Enters.*, 524 U.S. at 555 (Breyer, J., dissenting); see *id.* at 540 (Kennedy, J., concurring in judgment and dissenting in part).

That result follows from *Phillips* v. *Washington Legal Foundation*, 524 U.S. 156 (1998), and *Webb's Fabulous Pharmacies*, *supra*, which held that interest on bank deposits could not be taken without just compensation because the depositors had a property interest in their deposits, and the right to interest follows the right to principal under state property law. Those cases are of no avail to petitioners, however, because they rest on state-law property interests in the seized funds. *Phillips*, 524 U.S. at 165-167; *Webb's*, 449 U.S. at 160-161. As explained above, petitioners have no property interest of any kind in Section

640's extension of the limitations period for administrative claims.

Petitioners similarly take issue (04-1225 Pet. 22) with the Federal Circuit's determination that *Commonwealth Edison* supports its "conclu[sion] that a statutory right to be paid money, at least in the context of federal employee compensation and benefit entitlement statutes, is not a property interest for purposes of the Takings Clause." 04-1225 Pet. App. 22a. For the reasons explained above, however, the federal employment relationship is statutory, not contractual, and petitioners can point to nothing in the relevant statutes that expresses an intent to vest petitioners with property rights. See pp. 12-13, 17, *supra*.

c. For similar reasons, petitioners err in asserting (04-1225 Pet. 25-26) that their administrative claims are "property even if not yet reduced to judgment." As the Federal Circuit explained, a cause of action can provide the basis for a takings claim only when "the cause of action protects a legally-recognized property interest." 04-1225 Pet. App. 23a. Petitioners cannot generate a property interest merely by asserting a cause of action.

The reason is straightforward: although a cause of action is considered property for some purposes, "it is inchoate and affords no definite or enforceable property right until reduced to final judgment." *Austin* v. *City of Bisbee*, 855 F.2d 1429, 1436 (9th Cir. 1988) (internal quotation marks omitted). As this Court has explained, "[n]o person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit." *New York Cent. R.R.* v. *White*, 243 U.S. 188, 198 (1917). Thus, new legislation—including legislation repealing a provision of law on which the plaintiff had relied—generally applies to pending cases. *Plaut* v. *Spend-thrift Farm, Inc.*, 514 U.S. 211, 226-227 (1995); *Western Union Tel. Co.* v.

Louisville & Nashville R.R., 258 U.S. 13, 22 (1922). Because petitioners have not obtained a final judgment on any of their claims, their assertion of a cause of action does not give them property rights in any particular rule of law, including any particular limitations period for their administrative claims. Indeed, as the court of appeals noted, petitioners "have not cited any precedent finding such a property interest in a claim of Government liability before an administrative agency." 04-1225 Pet. App. 23a.

d. Petitioners err in contending (04-1225 Pet. 22 n.21) that there is a relevant "circuit split over the precedential status of *Eastern Enterprises*." Petitioners contend (*ibid.*) that the Federal Circuit and the First Circuit have "held that *Eastern Enterprises* has precedential effect on Takings Clause claims," while other circuits have held that "*Eastern Enterprises* either has no precedential effect, or that its holding is limited to similarly-situated plaintiffs."

To whatever extent there is any disagreement among the lower courts about how to apply the analysis of *Marks* v. *United States*, 430 U.S. 188 (1977), to *Eastern Enterprises*, it does not provide any basis for granting these petitions. The Federal and First Circuits both relied in part, but not in whole, on *Eastern Enterprises* for principles that were already settled. As explained above, the Federal Circuit relied on *Eastern Enterprises* for the proposition, previously announced in decisions of this Court and the Federal Circuit, that the mere imposition of an obligation to pay money is not a taking. See pp. 17-18, *supra*. Similarly, the First Circuit relied on *Eastern Enterprises* and two of its own prior decisions for the proposition that "a Takings Clause issue can arise only after a plaintiff's property right has been independently established." *Parella* v. *Retirement Bd. of R.I. Employees' Ret. Sys.*, 173 F.3d 46, 58 (1999); see *id.* at 59. That is a

bedrock proposition of settled takings jurisprudence mandated by the express text of the Takings Clause itself. See p. 11, *supra*.

There is no meaningful conflict among the circuits. No circuit has squarely held that *Eastern Enterprises* changed the law, or dictated a result that the court otherwise would not have reached. More importantly, no courts of appeals have disagreed about how to apply *Eastern Enterprises* to any particular question at issue in this case. Indeed, petitioners point to no specific difference in the courts' application of *Eastern Enterprises* to *any* issue, much less to an issue that is relevant to the disposition of this case.[3]

2. In addition to challenging the Federal Circuit's decision, petitioners assert (04-1226 Pet. 14-25; 04-1225 Pet. 27-28) that the D.C. Circuit erred in holding that the 1995 amendments do not violate the Due Process Clause. This Court previously denied a petition challenging the D.C.

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[3] The other cases cited by petitioners as the basis for the supposed circuit split involved the constitutionality of either the Coal Industry Retiree Health Benefits Act of 1992, 26 U.S.C. 9701 *et seq.* (the statute at issue in *Eastern Enterprises*) or the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.* None of those cases involved statutes of limitations, employee compensation, or alleged government contracts, and none of them held that a taking had occurred. See *United States* v. *Alcan Aluminum Corp.*, 315 F.3d 179, 188-190 (2d Cir. 2003) (holding that CERCLA is constitutional), cert. denied, 540 U.S. 1103 (2004); *Franklin County Convention Facilities Auth.* v. *American Premier Underwriters, Inc.*, 240 F.3d 534, 550-553 (6th Cir. 2001) (same); *A.T. Massey Coal Co., Inc.* v. *Massaranti*, 305 F.3d 226, 236-241 (4th Cir. 2002) (holding that the Coal Industry Retiree Health Benefits Act of 1992 is constitutional as applied in that case), cert. denied, 538 U.S. 1012 (2003); *Anker Energy Corp.* v. *Consolidated Coal Co.*, 177 F.3d 161, 169-174 (3d Cir.) (same), cert. denied, 528 U.S. 1003 (1999); *Association of Bituminous Contractors, Inc.* v. *Apfel*, 156 F.3d 1246, 1253-1258 (D.C. Cir. 1998) (same).

Circuit's judgment in this case (526 U.S. 1158 (1999)), and it should do so again. The D.C. Circuit's decision is correct and does not conflict with any decision of this Court or any other court of appeals.

a. Petitioners argue (04-1226 Pet. 15) that every Member of this Court agreed in *Eastern Enterprises* that "the Fifth Amendment requires more from retroactive legislation than a rational basis," and instead requires "a searching inquiry into the fundamental fairness of the burdens imposed by a law." Petitioners overread the opinions in *Eastern Enterprises*.

i. As the court of appeals recognized (04-1225 Pet. App. 61a), this Court has consistently held that retroactive legislation complies with due process principles if "the retroactive application of the legislation is * * * justified by a rational legislative purpose." *Pension Benefit Guar. Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 730 (1984); accord *General Motors Corp.* v. *Romein*, 503 U.S. 181, 191 (1992); *Sperry*, 493 U.S. at 64; *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15, 17-18 (1976). Indeed, even though petitioners assert that *Gray*, *Sperry*, and *Turner Elkhorn* "strongly suggest" that rationality is not the appropriate test, they ultimately concede that "[t]he test actually articulated in these cases * * * is the ordinary rational basis standard." 04-1226 Pet. 15 & n.9.

Eastern Enterprises did not overrule those settled precedents. Rather, the four-Justice plurality in that case confirmed that to prevail on a due process theory, a plaintiff must show that retroactive legislation is "arbitrary and irrational." 524 U.S. at 537 (plurality opinion) (quoting *Turner Elkhorn*, 428 U.S. at 15). Justice Kennedy, who concurred in the judgment and dissented in part, applied that traditional rational-basis test by stating that "due process requires an inquiry into whether in enacting the

retroactive law the legislature acted in an arbitrary and irrational way," and he concluded that the legislation at issue there bore "no legitimate relation to the interest which the Government asserts in support of the statute." *Id.* at 547, 549; see *id.* at 547 (noting that those "[a]ccepted principles" were "sufficient to dispose of the case").[1] Justice Breyer's dissent similarly explains that the Due Process Clause "safeguards citizens from arbitrary or irrational legislation." *Id.* at 556.

Moreover, petitioners err in attempting to draw a sharp distinction between rationality and fairness. It is precisely because "[r]etroactive legislation presents problems of unfairness" that such legislation must further "a legitimate legislative purpose * * * by rational means." *Romein*, 503 U.S. at 191. Thus, when Justice Breyer explained in his *Eastern Enterprises* dissent that "as courts have sometimes suggested, a law that is fundamentally unfair because of its retroactivity is a law that is basically arbitrary," 524 U.S. at 557, he was simply stating that fair-ness can be relevant to rational-basis review. Significantly, petitioners cite *no* decision of *any* court that has adopted their novel view of *Eastern Enterprises* or the Due Process Clause.

ii. In any event, the legislation at issue here, which retroactively changed a retroactive change, would satisfy

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[1] Although Justice Kennedy has described his separate opinion in *Eastern Enterprises* as calling for "heightened scrutiny for retroactive legislation under the Due Process Clause," *Kelo* v. *City of New London*, No. 04-108, 2005 WL 1469529, at *12 (June 23, 2005) (Kennedy, J., concurring), that statement apparently refers to the traditional rational-basis scrutiny applicable to all retroactive legislation, because Justice Kennedy has also emphasized that the standard he advocated in *Eastern Enterprises* is "permissive" and violated only in "rare instances." *Lingle* v. *Chevron U.S.A. Inc.*, 125 S. Ct. 2074, 2087 (2005) (Kennedy, J., concurring) (quoting *Eastern Enters.*, 524 U.S. at 550 (opinion of Kennedy, J.)).

any plausible legal standard. Petitioners do not deny that Congress had a rational basis for amending Section 640. As the lower courts explained, Congress rationally concluded that it should equalize the limitations period for most public and private sector workers filing FLSA overtime claims, both out of "fairness" and in light of competing demands on the federal budget. 04-1225 Pet. App. 61a, 83a-85a.

Petitioners' contentions regarding fundamental fairness ignore the context of the legislation. It was only *after* petitioners filed their administrative claims that Congress enacted the two relevant statutes. The first statute retroactively extended the limitations period for such claims; the second partially repealed that retroactive extension as applied to workers who had already received some overtime compensation for the hours at issue. See pp. 5-6, *supra*. Although petitioners focus solely on the second statute, the combined effect of the two retroactive statutes was to leave petitioners no worse off (and in some respects better off) than when they performed the relevant work and filed their claims. There is nothing "fundamentally unfair" about that.

b. Petitioners nonetheless assert that laws shortening statutes of limitations are "essentially *per se* violations of Due Process unless they provide a reasonable prospective grace period in which claimants who would otherwise be barred can file their claims." 04-1226 Pet. 21; see *id.* at 22 & n.12 (citing, *e.g.*, *Block* v. *North Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 286 n.23 (1983)). That contention has nothing to do with this case because the 1994 and 1995 statutes only affected claims that had already been filed. The 1994 legislation was expressly limited to "claims filed before June 30, 1994" (three months before the statute's enactment), and the 1995 legislation only repealed in part the 1994 legislation. See pp. 5-6, *supra*. Because Congress expressly limited the statutes to already-filed

claims, a grace period for unfiled claims would have been meaningless.

Moreover, all of the cases on which petitioners rely involve limitations periods for judicial claims. It is far from clear that Congress is similarly constrained in adjusting the limitations period for administrative filings while leaving the period for substantially identical claims in a judicial forum wholly unaffected, particularly where its purpose is to correct past mistakes and it leaves the "net" limitations period for administrative claims essentially the same. See generally *Paramino Lumber Co.* v. *Marshall*, 309 U.S. 370, 378-379 (1940); *Graham* v. *Goodcell*, 282 U.S. 409, 429 (1931).

c. Petitioners' contention (04-1226 Pet. 23) that "it is a *per se* violation of the Fifth Amendment for the United States to abrogate its own debts," is likewise misplaced. Indeed, that argument merely repackages petitioners' takings claims in due process terms. Petitioners rely on cases that involved challenges to the government's legislative repudiation of specific contractual agreements, such as agreements to redeem bonds or pay insurance proceeds. See *id.* at 22-23 (citing, *e.g.*, *Perry*, *supra*; *Lynch*, *supra*). Those cases are irrelevant because the retroactive repeal of the retroactive extension of the administrative limitations period at issue here did not violate any contract, as explained above. See pp. 12-16, *supra*.[5]

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[5] There is no property interest that could give rise to a due process claim in this case because, as explained above, petitioners had no property interest in Section 640's retroactive extension of the limitations period for administrative claims. See pp. 12-21, *supra*. As the D.C. Circuit recognized, however, that question need not be reached in this case, because even assuming *arguendo* that the Due Process Clause is implicated, Congress's amendment of Section 640 satisfies rational basis review. See 04-1225 Pet. App. 61a; p. 25, *supra*.

3. Petitioners' contention (04-1225 Pet. 28-29) that "[t]his case presents questions of great national importance" rests on their mistaken premise that "[t]he Federal Circuit held that the United States can retroactively abrogate its obligations." The practical significance of this case is likely limited to government employees, because government contractors and others who do business with the government typically enter into contractual relationships with the government, and are therefore protected by the Takings Clause. See p. 12, *supra*. Even with respect to the affected government employees, the combined effect of the 1994 and 1995 legislation was to give petitioners *greater* rights than they would have had under the statutes in effect at the time they performed the relevant work and filed their claims. See p. 15, *supra*. Thus, the government has not sought to abrogate its debts, as petitioners repeatedly contend (*e.g.*, 04-1225 Pet. 2-3; 04-1226 Pet. 25).

In contrast, petitioners' position would deprive Congress of needed flexibility, because it would mean that Congress could not unilaterally extend a benefit with confidence that it could later withdraw that benefit in light of changed circumstances or second thoughts. That could make Congress less inclined to extend new benefits, and it would represent a significant intrusion into Congress's authority to legislate in the public interest.

Petitioners' contentions (04-1226 Pet. 12, 13) that the combined holdings of the Federal and District of Columbia Circuits produce an "egregious whipsaw," and lead to a result that no member of the *Eastern Enterprises* Court would have approved, is particularly misplaced. If Congress had actually sought to extinguish its obligation to pay earned wages to federal employees, a more difficult due process question would be presented, and the fairness concerns raised by the concurring and dissenting opinions

in *Eastern Enterprises*—concerns that were expressed in the context of rational-basis review, see pp. 23-24, *supra*—would be more pronounced. But nothing in any of the *Eastern Enterprises* opinions can reasonably be read to suggest that Congress can not retract an administrative benefit it unilaterally provided *after* the relevant work had been completed.

Although petitioners note that the Federal Circuit has exclusive jurisdiction over some takings claims (04-1225 Pet. 29-30), that circuit does not have exclusive jurisdiction over all takings challenges to government actions. See, *e.g.*, *Prometheus Radio Project* v. *FCC*, 373 F.3d 372, 428, 430 (3d Cir. 2004) (adjudicating takings challenges to administrative regulation), cert. denied, No. 04-1020, 2005 WL 229245 (June 13, 2005); *Pittston Co.* v. *United States*, 368 F.3d 385, 405-406 (4th Cir. 2004) (adjudicating takings challenge to statute), cert. denied, 125 S. Ct. 1589 (2005). Nor does the Federal Circuit have exclusive jurisdiction over takings claims generally, as petitioners' allegation of a circuit split on the takings issue demonstrates. See 04-1225 Pet. 22 & n.21 (citing decisions from seven circuits). Due process issues likewise arise in the regional circuits, as shown by the D.C. Circuit's adjudication of petitioners' due process claim. Thus, the absence of a circuit split weighs strongly against further review.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 2005

Supreme Court, U.S.
FILED
JUL 6 - 2005
OFFICE OF THE CLERK

No. 04 - 1225

In the
Supreme Court of the United States
October Term, 2004

STEPHEN S. ADAMS and 14,302
other similarly situated plaintiffs,
Petitioners,
v.
UNITED STATES,
Respondent.

On Petition for Writ of *Certiorari*
to the United States Court of Appeals for the Federal Circuit

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BRIEF OF *AMICI CURIÆ* NEW ENGLAND LEGAL FOUNDATION AND DEFENDERS OF PROPERTY RIGHTS IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

Amici curiæ New England Legal Foundation and Defenders of Property Rights support all three questions presented by Petititioners Stephen S. Adams *et al.* This brief of *amici curiæ* addresses the first two questions presented:

1. Whether the federal government can withhold and confiscate the wages that it owes its employees, for work already performed, without paying just compensation under the Takings Clause.

2. Whether monetary obligations of the United States qualify as property protected by the Takings Clause.

In particular the brief of *Amici* focuses on the following concern:

> Money owed by the United States government and recognized by statute constitutes property protected by the Just Compensation (or Takings) Clause of the Fifth Amendment to the Constitution.

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No. 04 - 1225

In the
Supreme Court of the United States
October Term, 2004

STEPHEN S. ADAMS and 14,302
other similarly situated plaintiffs,
Petitioners,
v.
UNITED STATES,
Respondent.

On Petition for Writ of *Certiorari*
to the United States Court of Appeals for the Federal Circuit

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BRIEF OF *AMICI CURIÆ* NEW ENGLAND LEGAL FOUNDATION AND DEFENDERS OF PROPERTY RIGHTS IN SUPPORT OF PETITIONERS

INTEREST OF *AMICI CURIÆ*

Amici Curiæ the New England Legal Foundation ("NELF") and Defenders of Property Rights ("Defenders") seek to bring to the Court's attention their views, and the views of their supporters, concerning the nature of intangible property protected by the Just Compensation Clause and the importance to the economic system of protecting intangible property rights such as the right to accrued, statutorily guaranteed overtime pay at issue in this case.[1]

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1 Pursuant to Supreme Court Rule 37.6, counsel for *amici* state that neither counsel for Petitioners nor Respondent authored this Brief in whole or in part and no person or entity other than *amici* made a monetary

NELF is a non-profit, public interest law firm, incorporated in Massachusetts in 1977. It is headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth for New England, protecting the free enterprise system, and defending economic rights. NELF's more than 130 members and supporters include large and small corporations from all parts of New England and the United States, all concerned with the national business climate. Some of NELF's members are affected by retroactive abrogation of government obligations because they hold or insure government obligations or perform services for or provide goods to the Government. NELF has regularly appeared in state and federal courts, as party or counsel, in cases raising issues of general economic significance to the New England and national business communities.[2]

Defenders of Property Rights is the only national legal defense foundation dedicated exclusively to protecting private property rights. Based in Washington, D.C., Defenders was founded as a non-profit, public interest legal foundation in 1991 and has 23,000 members. Its mission is to protect vigorously those rights considered essential by the Framers of the Constitution, and to promote a better understanding of the relationship between private property rights and individual

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contribution to the preparation or submission of the brief. Pursuant to Supreme Court Rule 37.2 (a), counsel for *Amici* has submitted consents by both parties to the filing of this Brief.

2 *See, e.g., Kelo v. City of New London*, ___ S. Ct. ___ (2005); *San Remo Hotel, L.P. v. City of San Francisco*, 125 S. Ct. 2491 (2005); *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 125 S. Ct. 1517 (2005); *Commissioner v. Banks*, 125 S. Ct. 826 (2005); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002).

liberty. Defenders engages in litigation across the country on behalf of its members and the public interest to prevent government incursion into protections guaranteed by the Bill of Rights. Since its inception, Defenders has participated in every major property rights case before the U.S. Supreme Court.[3]

Amici are interested in a properly working government that recognizes and honors its obligations, including its obligations to its own employees. Protection of long-standing expectations, such as the expectation of promised wages, is an essential element of the protection of private property and investment. For those reasons, *Amici* are concerned about the issues presented in this case.

Amici Curiæ believe that this brief provides an additional perspective which may aid the Court in determining whether to grant the petition for a writ of *certiorari* of the petitioners, Stephen S. Adams *et al.*

STATEMENT OF THE CASE

Amici adopt the Statement of the Case contained in the Brief of Petitioners Stephen S. Adams *et al.* ("the Employees").

SUMMARY OF ARGUMENT

The Employees' unpaid overtime wages and their claims for those wages both constitute forms of property

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3 *See, e.g., Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, ___ S. Ct. ___ (2005); *Kelo v. City of New London*, ___ S. Ct. ___ (2005); *San Remo Hotel, L.P. v. City and County of San Francisco*, 125 S. Ct. 2491 (2005); *Lingle v. Chevron U.S.A., Inc.*, 125 S. Ct. 2074 (2005); *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 125 S. Ct. 1517 (2005); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001).

protected by the Just Compensation Clause. This Court has granted Just Compensation Clause protection to money owed and claims for money owed as forms of property. The decision below, however, would protect only "funds of money," defined in a cramped and artificial way to exclude the Employees' discrete, easily ascertainable claims to overtime pay. The government's reneging on the unpaid wages in this case is not simply a generalized assessment that affects the Employees along with others or a retroactively imposed obligation to pay money for benefits. Rather, the government is attempting to place the burden of enriching its general funds on these specific Employees. The purpose of the Just Compensation Clause is to keep the government honest by requiring it to pay when it places unfair burdens on a limited number of individuals. Permitting the government to negate monetary obligations without the protection of the Just Compensation Clause would be contrary to the historical treatment of monetary obligations as choses in action, a long recognized form of intangible personal property. Such a repudiation is also poor public policy because the government's willingness to repay its debts is a major force for maintaining social and economic stability.

ARGUMENT

I. There is a material distinction between an assessment against a private party to pay money to the government and the obligation of the government to pay money to a private party.

The Employees' claims for unpaid overtime constitute property, fully compensable and protected by the Just

Compensation (or Takings) Clause of the Fifth Amendment.[4] When government upsets reasonable expectations, in this case created by the government, the Just Compensation Clause protects those expectations, and encourages subsequent productive capital investments, by providing compensation. The Just Compensation Clause prevents the government from imposing an undue burden on a few citizens. In this case, it is uncontested that the Employees worked a significant number of overtime hours and that, when they filed their claims, the Employees had a reasonable expectation that they could recover up to six years of overtime wages through the administrative process.

The decision of the Court of Appeals for the Federal Circuit below mischaracterizes the wages due to over 14,000 federal employees for overtime work as an insignificant and unprotected "ordinary obligation to pay money." *Adams v. United States,* 391 F.3d 1212, 1224 (Fed. Cir. 2004). As the Employees point out, the decision below illogically equates a permissible governmentally imposed assessment on private parties to pay money to the government (in essence, a tax, fee, or special assessment) with the government's negation of its obligation to pay its debts to others, including a debt for earned overtime pay. Petition at 19–26. *See Adams,* 391 F.3d at 1219–24. The Court of Federal Claims, in the trial court decision affirmed by the Federal Circuit in this case, acknowledges that the government's obligation to pay its employees is *the reverse* of private parties' unprotected "obligation to pay money" to the government. *Adams v. United States,* 2003 WL 22339164 at *8 (Fed. Cl. 2003), *aff'd,* 391 F.3d 1212 (Fed. Cir. 2004). *See*

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4 *Amici* fully support and adhere to the position of the Employees on all the substantive and procedural issues treated in their Petition.

Commonwealth Edison Co. v. United States, 271 F.3d 1327, 1340 (Fed. Cir. 2001). Nevertheless, the decision below confounds these obligations running in opposite directions, ignoring the difference in power and authority between obligations imposed on private parties by the Government and obligations to private parties acknowledged by the Government. *Adams*, 391 F.3d at 1224.

This distinction constitutes a major difference. First, the private parties' obligation to pay the government discussed in *Commonwealth Edison* was an assessment attributable to costs the assessed industry imposed on society, and thus a form of tax or special assessment. *See Commonwealth Edison Co. v. United States*, 46 Fed. Cl. 29, 40 n.11 (2000) (case involved "imposition of a financial burden in the nature of a tax"), *aff'd*, 271 F.3d 1327 (Fed. Cir. 2001). This case, on the other hand, resembles the taking of a specific, separately identifiable legal right—the sum attributable to the Employees' accrued overtime—rather than a tax. Unlike a tax, the 1995 Statute (P.L. 104-52 (Nov. 19, 1995)) eviscerates the Employees' unpaid wage claims, making the action a taking of their entire interest in their pending unpaid overtime claims. "The regulations [involved in successful regulatory takings cases] were challenged as being *so excessive as to destroy*, or take, *a specific property interest*." *Eastern Enter.*, 524 U.S. at 542 (Kennedy, J. concurring in the judgment, dissenting in part) (emphasis added). A tax, however, would appropriate only a portion of the Employees' claims, leaving the bulk of the Employees' overdue overtime wages intact.

Second, the appropriation of the Employees' money in this case is not in any way based on costs to the government arising from their work, but simply improves the government's general bottom line. While an assessment that takes property in its entirety is not perforce a taking, there must be some nexus

between the purpose to which the assessment will be applied and parties assessed. When an "exaction is a forced contribution to general governmental revenues, and it is not reasonably related to the costs of" administering the relevant funds, the exaction constitutes a taking. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163 (1980).[5] For example, in *Eastern Enterprises*, coal companies had to pay for their retired employees' health benefits; in *Commonwealth Edison*, energy companies had to pay for the decommissioning costs of nuclear energy waste treatment plants. The 1995 Statute, which effectively annulled Petitioners' administrative law claims for unpaid overtime wages, did not impose a simple bookkeeping fee to reimburse the government for the costs of reviewing and tallying up old overtime records; it completely eviscerated the government's obligation to pay overtime. The 1995 Statute is a classic case of ignoring, "[t]he Fifth Amendment's guarantee . . . [, which] was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Therefore, the equation in the opinion below of a fee imposed on a regulated industry with wages owed by the government to its own employees is a misapplication of *Eastern Enterprises*' reasoning well beyond its reach.

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5 This principle harks back to the classical nineteenth-century position that "taxation and takings differ in degree, not in kind," depending on the generality or specificity of the burden and benefit. Eric Kades, *Drawing the Line Between Taxes and Takings: The Continuous Burdens Principle, and its Broader Application*, 97 NW. U. L. REV. 189, 201–03 (2002). *See Dane v. Jackson*, 256 U.S. 589, 599 (1921) (state tax might "clearly result[] in[] such flagrant and palpable inequality between the burden imposed and the benefit received, as to amount to the arbitrary taking of property without compensation.").

II. Courts have long recognized intangible monetary claims such as those of the Employees as a form of property.

Contrary to centuries-old precedents, the decision below agreed with the Government that the Employees' claim was merely an "ordinary statutory obligation to pay money[, which] can never constitute property for purposes of the Takings Clause." *Adams*, 391 F.3d at 1223. *See Adams*, 2003 WL 22339164 at *6 ("[M]oney does not constitute property within the Fifth Amendment's Takings Clause."). The opinion below attempts to differentiate between the purportedly uncompensable action here and a taking of intangible property by examining the "nature of the interest" that is being regulated. If the interest is "a legally-recognized property interest," it is compensable, but if it is "an ordinary obligation to pay money," it is uncompensable. *Adams*, 391 F.3d at 1224.

A. Historical Treatment of Money and Claims for Money (Choses in Action) as Property

Although intangible property such as money has become increasingly important in recent years, money as a form of intangible property is a long-recognized legal concept. In his leading common law treatise, which strongly influenced the Constitutional Framers' view of property, William Blackstone treated money as a form of personal property, a chattel personal. 2 W. BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* *387 (1766). Money remains a recognized form of property because people earn it through their work, their ideas, or the careful stewardship of their assets. The Supreme Court has explicitly recognized the intangible results of such investments as constitutionally protected property: "'[P]roperty' extends beyond land and tangible goods and

includes the products of an individual's 'labor and invention.'" *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984) (citing Blackstone and John Locke). *See also* Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 993–94 (2002) ("[A]s contract rights . . . enter into general circulation as investments or *money*, they become property." (emphasis added)). In this case, the money at issue is clearly the product of the compensable overtime labor of the Employees.

In this case, the government has not simply taken the Employees' money, but it has taken their labor without fulfilling the promise that their labor would be rewarded. The terms of that reward included the expectation that any dispute over their wages could be brought for six years. The 1995 Statute dashed those expectations by abrogating their administrative causes of action to recover money damages for their unpaid overtime wages. *See* Petition at 14–20 (on the contractual nature of debts for wages earned under a statutory framework). The decision below dismisses the Employees' claims for compensation for their own labor as "as nothing more than an allegation that money is owed." *Adams*, 391 F.3d at 1225. Yet, the concept of intangible personal property in law suits was ancient before the American Revolution when Blackstone discussed such property rights as choses in action—rights or damages recoverable only by a suit at law. 2 BLACKSTONE at *396–98 ("If a man promises, or covenants with me, to do any act, and fails in it, whereby I suffer damage, the recompense for this damage is a chose in action .... [A]ll property in action depends entirely upon contracts, either express or implied; which are the only regular means of acquiring a chose in action . . . ."). *See id.* at *438. For a history of choses in action as a form of intangible personal property, see 7 WILLIAM HOLDSWORTH, *HISTORY OF ENGLISH LAW* 515–44

(2d ed. 1937). This Court continues to treat choses in action as "protected property interest[s] in [their] own right." *Richards v. Jefferson County*, 517 U.S. 793, 804 (1996). *See Dames & Moore v. Regan*, 453 U.S. 654, 688-90 (1981) (takings claim for chose in action properly within jurisdiction of United States Court of Federal Claims).

Choses in action include the right to collect on debts of all kinds, including debts owed on contracts, as well as bonds, bills, notes, and checks. 7 HOLDSWORTH at 516. Choses in action to an ascertained sum of money (in other words, a debt) became effectively assignable through designation of the assignee as an attorney-in-fact as early as the fourteenth century. 7 HOLDSWORTH at 534. *See* 2 BLACKSTONE at *442. By the eighteenth century, equity enforced the assignment of debts as choses in action. 7 HOLDSWORTH at 535–36. Thus, the idea of treating unpaid debts as a form of property has an ancient lineage. Only by dismissing this history out of hand could the opinion below disregard the value of the Employees' legitimate unpaid overtime claims as a long-recognized form of intangible property. Nevertheless, the opinion, without discussion, insisted on distinguishing the long-recognized property interest in money and accrued obligations to pay money from "legally-recognized property interest[s]." 391 F.3d at 1224.

B. Theoretical Treatment of Money as Property, the Monsanto *Test*

While legal history supports the treatment of money and legal claims for money as forms of property, American constitutional history and theory also buttress the respectful treatment of such intangibles as property. James Madison, the principal author of the Constitution and the Bill of Rights, wrote that property, "[i]n its larger and juster meaning . . .

embraces everything to which a man may attach a value and have a right . . . . [A] man's land, or merchandise, or *money* is called his property." James Madison, *Property*, in THE MIND OF THE FOUNDER 186 (Marvin Meyers ed., rev. ed. 1981) (originally published in NATIONAL GAZETTE, March 29, 1792) (emphasis added).

This historic treatment of money and claims for money damages as forms of property continues through the present. "[C]ourts typically have recognized contract rights as a valuable form of property under the Takings Clause. In general, courts recognize that if someone is willing to bargain for and exchange some form of consideration for an intangible right, then the intangible interest is property." Michael J. Hostetler, Note, *Intangible Property under the Federal Mail Fraud Statute and the Takings Clause: A Case Study*, 50 DUKE L.J. 589, 605–06 (2000) (footnotes omitted) (protected property includes a person's time and choses in action).[6]

Not long ago, this Court discussed the method it used to analyze whether intangible legal claims constitute constitutionally protected property. The Court decided that trade secrets were a form of property because they were assignable, could form the res of a trust, and pass to a trustee in bankruptcy. *Monsanto*, 467 U.S. at 1001.

All of these attributes apply with equal force to the overtime claims at issue in this case. Choses in action regarding claims to collect contractual debts have been assignable for

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6 For a recent treatment of contract rights as a protectable property interest, see *U.S. Trust Co. v. New Jersey*, 431 U.S. 1, 19 n.16 (1977) (state could not abridge bondholders' security rights by statutory amendment).

centuries. 7 HOLDSWORTH at 534.[7] Choses in action are treated as property in bankruptcy[8] and can constitute the subject of a trust.[9] Moreover, since before the Revolution, stealing a chose in action could result in prosecution for theft of property. 4 W. BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* *234 (1769). *See* 7 HOLDSWORTH at 542. The Employees' unpaid overtime wages in this case are not an unfounded "allegation," *Adams*, 391 F.3d at 1224, or "a mere unilateral expectation or an abstract need." *Webb's*, 449 U.S. at 161. They are overdue unpaid wages for which the Employees worked, for which they filed claims that were clearly timely when made, that they have continued to pursue for over a decade, and that Congress explicitly recognized as valid in P.L. 103-329 § 640 (Sept. 30, 1994) ("Section 640"), only to abrogate them a year later when it realized the cost. Therefore, the Employees' unpaid wage claims, as choses in action, clearly meet the requirements of the *Monsanto* test warranting treatment as constitutionally protected intangible property.

III. The Government misreads *Eastern Enterprises* by protecting only "funds of money" under the Just Compensation Clause.

The decision below does more than summarily dismiss all statutory obligations of the federal government as mere "allegations of money owed." *Adams*, 391 F.3d at 1225. It would

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7 The Employees' claims in this case, as claims against the Government, while clearly transferable by inheritance, may be assignable subject to the limitations of 31 U.S.C. § 3727 (claims assignable to financing institutions or after warrant issued).

8 *Baker v. Gold Seal Liquors, Inc.*, 417 U.S. 467, 471 n.7 (1974).

9 *City of Philadelphia v. Mancini*, 431 Pa. 355, 363, 246 A.2d 320, 324 (1968) (citing Scott on Trusts).

also unduly restrict money-based takings claims to accrued interest. It does so by adopting the phrase "fund of money" as a term of art. *Adams*, 391 F.3d at 1222–23. *See Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1338 (Fed. Cir. 2001). "Fund of money" is taken from the *dissent* in *Eastern Enterprises. Eastern Enter.*, 524 U.S. at 555 (Breyer, J. dissenting). The decision below equates "fund of money" to the phrase "identified property interest," used by Justice Kennedy in his concurrence in *Eastern Enterprises. Eastern Enter.*, 524 U.S. at 540 (Kennedy, J. concurring in the judgment). *See Adams*, 391 U.S. at 1224.

"For Justice Kennedy [in *Eastern Enterprises*], the question of whether the government has committed a taking depends on the specificity of the property interest affected; a generalized obligation that does not identify a *particular means of satisfaction* does not constitute a taking because it does not directly affect a specific property interest." Ronald J. Krotoszynski, Jr., *Expropriatory Intent: Defining the Proper Boundaries of Substantive Due Process and the Takings Clause*, 80 N.C. L. REV. 713, 746 (2002) (emphasis added). In other words, Justice Kennedy used "identified property interest" to refer to a specific or particular property interest, in this case the quantifiable and individually ascertainable overtime wages due to each employee. *See Eastern Enter.*, 524 U.S. at 543 (Kennedy, J., concurring) ("The Coal Act neither targets a *specific* property interest nor depends upon any *particular* property for the operation of its statutory mechanisms." (emphasis added)). *See also* Krotoszynski, 80 N.C. L. REV. at 745 ("For Justice Kennedy, the essence of a takings claim is the identification of a specific res that the government seeks to seize or control . . . .").

The relevant issue for Justice Kennedy's analysis in *Eastern Enterprises* is whether the government has identified a

particular asset out of which affected parties will satisfy the obligation to pay. Krotoszynski, 80 N.C. L. REV. at 745. "The [Coal Act] simply imposes an obligation to perform an act, the payment of benefits. The statute is indifferent as to how the regulated entity elects to comply or the property it uses to do so." *Eastern Enterprises* at 540 (Kennedy, J. concurring). In this case, on the other hand, the Government has not imposed a general obligation to pay on the Employees, which they might satisfy in any means available to them (by for example, taking a loan, liquidating an investment, or selling real property), but instead has specifically confiscated their owed, unpaid overtime wages. The 1995 Statute is not indifferent as to how the Employees' elect to comply or the property they use to do so, because they must pay out of their accrued overtime wages.

Justice Breyer in dissent used "fund of money" in an attempt to distinguish interest on an interpleaded sum, which the Just Compensation Clause protects,[10] from the forced funding of retired coal workers' health benefits, which the dissenters (joined by concurring Justice Kennedy) would have exempted from Just Compensation Clause protection. Even Justice Breyer's opinion emphasizes that a "fund of money" entitled to Just Compensation Clause protection must be "specific" and "separately identifiable"; not that it be kept in a separate account. *Eastern Enter.*, 524 U.S. at 555 (Breyer, J. dissenting).[11]

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10 *See Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980).

11 The decision below apparently agrees with the Government's contention that there is no viable distinction between the Employees' claims for specific accrued unpaid overtime wages in this case and the assessments against energy companies' general funds in *Commonwealth Edison. Adams*, 391 F.3d at 1223. The decision below gives an unduly constrained meaning to the term "specific" in relation to property, confining it to an "actual sum of

This Court's recent decision on interest on lawyers' trust accounts (IOLTA) sheds light on the broad range of monetary property interests protected by the Just Compensation Clause. *Brown v. Legal Found.*, 538 U.S. 216 (2003). *Brown* recognized interest accrued in an aggregated IOLTA account as the property of the individual clients.[12] Thus an "identified property interest" or a "fund of money" might include money owed to many different individuals (as in this case). Each client in *Brown* could, however, ascertain the interest attributable to the client by simple calculations based on the amount on deposit, the rate of interest, and the length of deposit time. In this case, the Employees can similarly calculate the amount of unpaid overtime wages by multiplying total uncompensated overtime hours by the applicable overtime wage. In *Brown*, the "fund of money" arose out of a client's distinct amount of money on deposit. In this case, the unpaid overtime "fund of money" arises out of each Employee's distinct amount of time worked at the appropriate hourly overtime rate.

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money representing interest derived from ownership of particular deposits in an established account." *Adams*, 391 F.3d at 1224. No matter how specific to the particular individual employee, how readily ascertainable, and how clearly the wages could be pursued separately by each individual, the opinion below characterizes all monetary obligations other than interest on a particular deposit account (not even, apparently, the deposit account itself) as too general in nature to warrant takings protection. This issue is addressed above and in the Petition at 22.

12 This Court upheld the Washington State IOLTA program against a taking challenge in *Brown* only because the taking was "a mere technical taking." 538 U.S. at 236. The taking was "technical" because the amount of interest due to any specific client was negligible and the costs of distributing such a small amount of interest outweighed the benefit of the interest payments to the client. 538 U.S. at 235–37.

Professor Thomas Merrill has devoted a lengthy article to harmonizing the Court's treatment of intangible property in its recent takings decisions. Merrill, 86 VA. L. REV. 885. He equates "fund of money" to a "discrete asset," which he defines as:

> a valued resource that (1) is held by the claimant in a legally recognized property form (for example, a fee simple, a lease, an easement, and so forth), and (2) is created, exchanged or enforced by economic actors with enough frequency to be recognized as a distinct asset in the relevant community.

Merrill, 86 VA. L. REV. at 974.[13]

In this case, the Employees' unpaid overtime claims are

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13 Merrill discusses at length the status as property of legal claims based upon contract, such as the employment-related claims in this case:

> The property-as-ownership definition requires that the claimant have an irrevocable right to exclude others from discrete assets. Some rights grounded in contract will satisfy this definition, others will not. Most choses in action originate as *contract rights*, as do bonds, common stock, and *even money issued by the government. These interests are commonly regarded as property and are assumed to be protected by the Takings Clause*. . . . The holder of such an interest can call upon the full force and authority of the state to exclude others from interfering with the asset. And such interests are nearly always irrevocable either for a defined period of time (as with bonds) or indefinitely (*as with money*).

Merrill, 86 Va. L. REV. at 992–93 (footnote omitted) (emphasis added). The Employees address the equivalence of contractual employment rights with the statutory employment rights of employees in this case. Petition at 14–20.

choses in action, a well recognized form of intangible property, as discussed above. Overtime wages obligations under the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.*, are created routinely, whenever covered employees in the public or private sector work overtime. Claims for unpaid overtime are enforced by federal government enforcement actions as well as by private actions. Like most other similar claims for money, overtime claims can be exchanged, at a discount, for cash.[14]

The Employees' overtime pay is specific and identifiable. Each Employee's overtime pay is readily ascertainable from employment records showing the number of overtime hours worked and that Employee's applicable overtime rate of pay. Like other valid claims for money damages, the Employees' claims for unpaid overtime are irrevocable except, as in this case, when abrogated by a statute effecting a taking of those claims.

Therefore, even if the Just Compensation Clause only protects money as an "identified property interest" or a " "fund of money," the Employees' unpaid overtime wages in this case constitute such a "fund of money." Like the IOLTA interest in *Brown*, the amount due to each Employee is readily ascertainable, even if it is not kept in a separate account. Unlike the IOLTA interest in *Brown*, the sums due to each employee are not negligible and represent significant wages to each employee in return for working overtime. The Employees' claims similarly meet Professor Merrill's definition of "discrete

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14 For the prevalence of payday loans, see Federal Trade Commission, Consumer Alert, *Payday Loans = Costly Cash*, February, 2000, available at http://www.ftc.gov/bcp/conline/pubs/alerts/pdayalrt.htm. For online sources of lawsuit financing, see http://www.lawsuitcash.com, http://www.legalfundinggroup.com.

assets" because each Employee's claim could be disaggregated and sold at a discount as a valid assignable legal claim to money.

IV. Public policy militates against allowing the government to renege on acknowledged debts.

Government should not be allowed, by retroactive regulation, to avoid payment of acknowledged government debts. If the government could do so, it could avoid paying government bonds and notes, which, like government wages, are ultimately paid out of general funds. Like the wages in this case, the trade-in value of the bond or note, if retired early, and often if held beyond maturity, is not apparent on its face, but is readily ascertainable by application of a simple formula (based on interest in the case on notes and bonds, and applicable overtime rates in the case of the wages at issue in this case).

The financial obligations of the United States government and its agencies constitute one of the most significant components of the international financial markets. Short-term treasury bills constitute a significant vehicle for federal fundraising, particularly to finance deficit spending. MARC LEVINSON, *GUIDE TO FINANCIAL MARKETS* 44–45 (1999). United States government agencies have also become "among the most important money-market borrowers." *Id.* at 45. United States Treasury bonds, known as "Treasuries," are the most widely held securities in the world. *Id.* at 60. Over four trillion dollars of Treasury obligations are in private ownership. Department of the Treasury, Bureau of the Public Debt, Summary of Treasury Securities Outstanding, May 31, 2005, available at http://www.publicdebt.treas.gov/opd/opds052005.htm.

The rates that government borrowers pay depends on

the security of the investment. In other words, governments pay more when they do not stand behind their financial obligations. LEVINSON at 61. If this Court declines to protect the government's obligations to pay overtime wages due to its own employees under the theories advanced by the Government below and adopted by the decision below, similar theories could undermine other government financial obligations. The self-imposed restraint of the Just Compensation Clause is an important support for maintaining fiscal discipline in this vital financial sector. *See United States v. Winstar Corp.*, 518 U.S. 839, 884 (1996) (plurality opinion); LEVINSON at 61.

Recognizing governmental financial obligations, including wage obligations to its own employees, as a form of property thus upholds long-standing precedents treating money as intangible property. It also strengthens the vision of the Founders by creating a fair and just society that values the hard work of its citizens. Madison seemed to be speaking directly to this situation in his essay on property:

> If there be a government . . . that prides itself in maintaining the inviolability of property; . . . which *indirectly* violates [individuals'] property . . . in the labor that acquires their daily subsistence, and in the hallowed remnant of time which ought to relieve their fatigues and soothe their cares—the inference will have been anticipated that such a government is not a pattern for the United States.

Madison, *Property*, at 188 (emphasis in original). In this case, the United States by statute informed its own employees that if they gave up their "hallowed" free time to work overtime, the government would compensate them accordingly. When the

government realized how much the compensation cost, it reneged on the deal. Fairness, justice, and fidelity to the Constitution would fulfill Madison's directive by recognizing the Employees' unpaid overtime wage claims as a valuable property right protected by the Fifth Amendment. Because of the significant public interest at stake in the recognition and enforcement of government obligations, this case merits the grant of *certiorari*.

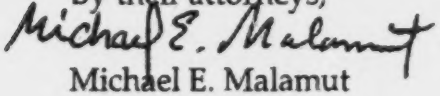
CONCLUSION

For the foregoing reasons, NELF urges this Court to grant the Petition of Petitioners Stephen S. Adams *et al.* for *certiorari*.

Respectfully submitted,

NEW ENGLAND LEGAL FOUNDATION and DEFENDERS OF PROPERTY RIGHTS,

By their attorneys,



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Dated July 6, 2005

No. 04 - 1225

In the Supreme Court of the United States

STEPHEN S. ADAMS AND 14,302 OTHER SIMILARLY SITUATED PLAINTIFFS,

PETITIONERS,

V.

UNITED STATES,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

The opposition concedes that the Federal Circuit held that federal employees have no property right to the wages they are owed for work already performed—and that the United States can unilaterally abrogate its own obligation to pay those wages without paying just compensation. Indeed, it argues that the Federal Circuit was entirely correct. Yet in *Fisk v. Jefferson Police Jury*, 116 U.S. 131 (1885), this Court squarely held that the statutory pay of public employees becomes a contractual entitlement once the work is performed, and has repeatedly held that the United States cannot abrogate its own contractual debts.

The opposition also concedes that there is a circuit split over whether *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), contains any holding of this Court at all, Opp. 21, but nonetheless (again) argues that the Federal Circuit was correct on the merits—that "a majority of this Court" in *Eastern Enterprises* in fact "determin[ed] that a mere obligation to pay an undifferentiated amount of money, not drawn from a specifically identifiable fund, is not property for purposes of the Takings Clause," Opp. 17-18. Yet this Court has held squarely and repeatedly[1] that ordinary monetary debts *are* property, and that seizing them is a *per se* Taking. The Federal Circuit's distinction between debts that relate to a "fund of money" and those that do not is an unsupportable and perilous innovation, and a serious misinterpretation of this Court's various opinions in *Eastern Enterprises*. Thus, this Court's review is urgently needed.

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[1] *See Lynch v. United States*, 292 U.S. 571 (1934); *Perry v. United States*, 294 U.S. 330 (1935); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980); *Phillips v. Wash. Legal Found.*, 524 U.S. 156 (1998).

1. The opposition's principal argument against certiorari is a suggestion that the 1994 statute reinstating petitioners' wage claims was a mere gratuity. The United States asserts that petitioners ignore the "context" of amended Section 640, and that "the combined effect of the two retroactive statutes [original and amended Section 640] was to leave petitioners no worse off (and in some respects better off) than when they performed the relevant work and filed their claims." Opp. 25. Petitioners agree that the "context" of amended Section 640 is significant, but the United States's portrayal is self-serving and incomplete.

Throughout the entire period when petitioners performed their work and filed their administrative FLSA claims, longstanding GAO and OPM precedent assured them that they had six years to file. The United States asserts without any record support that GAO "had begun actively reconsidering that ruling." Opp. 4. If so it kept those misgivings to itself. The first notice to petitioners that their limitations period would be shortened came *four years after their claims were filed*, when GAO suddenly overruled sixteen years of settled precedent in *In re Ford*, 73 Comp. Gen. 157 (1994). The United States insists in hindsight that GAO had been wrong all along, and that the two-year period adopted in *Ford* was always the law. But these petitioners were entitled to rely on GAO, and it assured them that they had six years. The fact that private sector workers have a two-year limitations period is thus beside the point; they were never affirmatively misled by the government.

Congress understood the fundamental injustice of GAO's decision and enacted Section 640, which required GAO to apply a six year statute of limitations to FLSA claims filed before June 30, 1994. But rather than considering their

claims, GAO thereafter stonewalled petitioners to gain time for the interested agencies to lobby Congress for a retroactive repeal. Indeed, counsel for GAO acknowledged that GAO "does not intend to issue a decision ... until the Treasury-Postal Service and General Government Appropriations Bill, 1996 ... is enacted (because of the possible retroactive repeal of § 640 ...)." Complaint ¶ 31, JA34. After months of intense lobbying by the agencies, Congress passed amended Section 640. Its sponsor explained that without some change in the law the United States was obligated to pay "as much as $ 460 million ... for work done many years ago." 141 Cong. Rec. 32,597 (1995).

Understood in its full "context," § 640 was hardly a gratuity. Congress recognized that it owed these petitioners wages for work already performed—and that if they "missed" the filing period the fault lay, in equity, with the United States and not with them. It thus extended the limitations period, thereby restoring its obligation to pay.

It is black-letter law that a debt rendered uncollectible by a statute of limitations nonetheless persists as a legal obligation, and that a subsequent promise to honor the obligation *is not* a gratuity that can freely be withdrawn. Such promises are enforceable at law even without a peppercorn of additional consideration from the creditor.[2] That rule is deeply rooted in the common law and prevents the United States from claiming that the restoration of petitioners' valid claims for unpaid wages was a "gratuity" simply because those claims may briefly have been

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[2] *See* Restatement (Second) of Contracts § 82 (1981). In a similar vein this Court has held that statutes reviving expired limitations periods do not violate the Due Process rights of the person who had benefited from the expiration. *See Int'l Union of Elec., Radio & Mach. Workers Local 970 v. Robbins & Myers, Inc.*, 429 U.S. 229, 243-44 (1976).

uncollectible. It is settled law that "when the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals." *Lynch*, 292 U.S. at 579. The opposition's argument—that a promise to honor an obligation despite a limitations bar and the later retraction of that promise, taken together, leave the creditor no worse off—has been rejected under contracts law for centuries.

And in any event it is far from clear that the Takings Clause permits the government to seize a lawful obligation that is vested and currently payable, even if that obligation *was* entirely gratuitous. *Flemming v. Nestor*, 363 U.S. 603 (1960), held only that social security benefits can be modified *prospectively*. It did not embrace the United States's far more radical assertion that it can confiscate social security checks already due or even paid. Pet. 20 n.18.

Finally, even if these points were debatable, the United States's arguments on the merits do not diminish the significance of this case or the need for this Court's intervention. This Court could certainly correct the Federal Circuit's flawed holdings that federal employees never have an enforceable property right to their earned wages, or that monetary obligations are never property unless they relate to a "fund of money," regardless of whether it ultimately concluded that these petitioners prevail on the merits.

2. The United States concedes that "a contract with the United States can create a property right" protected by the Takings Clause, Opp. 12, but argues that petitioners have no contractual rights because the terms of federal employment are governed by statute. But the lower court cases it cites, Opp. 12-13, hold only that federal employees cannot claim to have been promised more than the relevant statutes provide. Those cases never suggest that the promises *made*

by those statutes do not give rise to enforceable obligations once the work is done. This Court squarely held in *Fisk* that the statutes governing the pay of public employees *do* create contractual obligations once the work is performed.

The United States has no coherent response. It protests that *Fisk* was decided under the Contracts Clause, but as the petition explained, "that is precisely the point. This Court held that a purely statutory obligation to pay wages *became* a contractual entitlement once the work was completed." Pet. 15. And even if "principles governing implied-in-fact contracts apply differently to the federal government" than to private parties, Opp. 14, which is by no means clear or relevant,[3] that does not remotely establish that those principles apply differently to the federal government than to *state* governments. Federal employment may be governed by statute, but so was the state employment in *Fisk*. 116 U.S. at 133. Finally, the opposition argues that in *Fisk* liability and damages had already been determined, whereas in this case the United States "has always disputed petitioners' right to FLSA compensation, and petitioners' claims still have not been resolved." Opp. 14. But whether the United States contests its lawful obligations does not change the fundamental nature of those obligations. And the fact that petitioners' claims have not been reduced to judgment is irrelevant; the same was true in *Lynch*, *Perry*, *Webb's*, and *Phillips*.[4] In

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[3] The contracts at issue here are not truly "implied-in-fact;" they are express and unilateral. Regardless, this Court has always held that the United States's contracts are governed by ordinary contract principles.

[4] To that extent *Austin v. City of Bisbee*, 855 F.2d 1429 (9th Cir. 1988), was wrongly decided. And even the United States does not genuinely believe that this case can be resolved by the truism that "'[n]o person has a vested interest in any rule of law entitling him to insist that it shall

any event, in the present posture this Court must accept as true petitioners' allegation that they are owed the money. And the blanket assertion that these claims "still have not been resolved" on the merits is false. Petitioners' entitlement to FLSA overtime has been extensively litigated, and the United States has already lost on the merits on many of petitioners' claims. *See* Pet. 4 n.4, 5 n.6.

The United States also argues that petitioners have no "contractual document" that could give rise to a contractual right to payment, and that the "Form 50" they signed "instead indicated that the FLSA did *not* apply to them." Opp. 13 (citation omitted). But the holding of *Fisk* is that no "contractual document" is necessary; the statutes governing public employee pay inherently give rise to a unilateral contract once the work is performed. And the United States's suggestion that language in the "Form 50" could alter its statutory obligations is both outrageous (what if that document had announced an intention to pay women less than men?) and inconsistent with its own argument that the terms of federal employment are purely statutory. An employee's FLSA right to overtime may not be waived.[5]

The United States attempts to distinguish *United States v. Larionoff*, 431 U.S. 864 (1977), on the ground that it involved "the interpretation of a statutory entitlement to compensation" rather than a Takings claim. Opp. 14. But

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remain unchanged for his benefit.'" Opp. 20 (quoting *N.Y. Cent. R.R. v. White*, 243 U.S. 188, 198 (1917)). It concedes that persons *do* have a vested interest in some rules of law—*i.e.*, those that create vested property rights. Opp. 16-17. Petitioners have no quarrel with the assertion that a cause of action must protect a "property interest" to be property itself. Opp. 20. Their causes of action plainly satisfy that test.

[5] *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 707 (1945); *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 740 (1981).

this Court interpreted the statute in *Larionoff* the way it did only to avoid the "serious constitutional questions" that it perceived would be presented by any statute which "deprive[d] a service member of pay due for services already performed, but still owing." 431 U.S. at 879. This Court's invocation of constitutional doubt in *Larionoff* may not be a "definitive resolution of the constitutional issue in this case." Opp. 14. But it certainly proves that these are serious constitutional issues which, now that they *are* squarely and unavoidably presented, deserve review.

3. The opposition argues that *Fisk* and *Larionoff* "addressed employees' rights to *compensation*," while "this case involves a *statute of limitations* for administrative claims." Opp. 15. But there is no difference for Takings purposes between abrogating a debt and rendering it unenforceable under a statute of limitations. Pet. 18 n.16.

The United States seeks to resurrect an argument that it made and lost in *Armstrong v. United States*, 364 U.S. 40 (1960). The plaintiffs in *Armstrong* had mechanics' liens on a boat that became unenforceable because of sovereign immunity when title to the boat passed to the United States. The United States argued that the interposition of sovereign immunity did not "take" the liens from the plaintiffs, but merely rendered them unenforceable. This Court held that "[s]ince this acquisition was for a public use, however accomplished," it did "take the property value of those liens within the meaning of the Fifth Amendment." *Armstrong*, 364 U.S. at 48-49. The United States's "immunity ... from enforcement of the liens [did not] relieve[] the Government from its constitutional obligation to pay just compensation for the value of the liens the petitioners lost and of which loss the Government was the direct, positive beneficiary." *Id.* at 49.

For suits against the United States, the statute of limitations is similarly an expression of sovereign immunity—a limitation on its consent to be sued. *See Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 93-94 (1990); *Harrell v. Fleming*, 285 F.3d 1292, 1293 (10th Cir.), *cert. denied*, 537 U.S. 1057 (2002). Under *Armstrong*, Congress's decision to render petitioners' claims unenforceable with a limitations bar is therefore precisely equivalent, for Takings purposes, to repudiating the obligations themselves.

4. The opposition argues that statutes create enforceable rights only if there is "'some clear indication that the legislature intends to bind itself contractually.'" Opp. 16 (quoting *Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry.*, 470 U.S. 451, 465-66 (1985)). It insists that "nothing in Section 640 expresses an intent by Congress to bind itself by conferring vested property rights on petitioners." Opp. 17.

That assertion misses the point. The vested rights in this case were created not by Section 640 but by the statutes promising petitioners wages, including FLSA overtime, in exchange for their labor. Those rights became vested contractual obligations under *Fisi* once the work was performed. Section 640 was a promise to honor those existing obligations despite expiration of the limitations period—which, under the common law of contracts, need not separately satisfy the requirements for a binding contract.

5. The remainder of the Takings analysis in the brief in opposition simply argues that the Federal Circuit was correct on the merits, and illustrates precisely why this Court's intervention is essential. It argues (Opp. 17) that the Federal Circuit's "fund of money" distinction was not just an interpretation of *Eastern Enterprises*, but was dictated by a footnote in *United States v. Sperry Corp.*, 493

U.S. 52, 62 n.9 (1989), which noted that "[u]nlike real or personal property, money is fungible." But the holding of *Sperry* is that reasonable user fees are not Takings. This Court did note that laws imposing obligations to pay money cannot all be Takings, which is surely correct. But the United States's suggestion that *Eastern Enterprises* simply "reiterated that conclusion" by "determining that a mere obligation to pay an undifferentiated amount of money, not drawn from a specifically identifiable fund, is not property for purposes of the Takings Clause," Opp. 17-18, is absurd. *Eastern Enterprises* contains no holding at all; *none* of its various opinions can fairly be read that way; and that generalization is both incoherent and squarely foreclosed by this Court's holdings in (at least) *Lynch* and *Perry*. Pet. 20-26. Even if the Federal Circuit was right in *Commonwealth Edison Co. v. United States*, 271 F.3d 1327 (Fed. Cir. 2001), *cert. denied*, 535 U.S. 1096 (2002), that laws *imposing* monetary obligations on private parties cannot be Takings, that would not justify the further step taken in this case—that laws *abrogating* monetary obligations owed to private parties by the United States are not Takings. *Lynch* and *Perry* hold that they are. Like the Federal Circuit, the United States has missed the real distinction in this Court's cases—which is between laws imposing new obligations to pay money in the service of some regulatory objective, and laws confiscating specific, pre-existing monetary obligations for the government's use. *Id.* The latter *are* Takings.

The United States argues that the petition overstates the Federal Circuit's holding, because the Federal Circuit conceded that "*contractual* obligations are ordinarily property." Opp. 19. Of course that concession is enough to resolve this case, since petitioners' rights *are* contractual under *Fisk*. Regardless, the suggestion that monetary

obligations are property only if they are either "contractual" or relate to a "specific identifiable fund" will not stand up. Could the United States confiscate workers' compensation benefits owing to an individual, or one person's *quantum meruit* obligation to pay another for the fair value of goods or services received? And there is no obvious "fund" in dispute in this case only because the United States has defied its obligations and left petitioners' wages commingled in the Treasury. Pet. 25. The only sensible rule is that vested monetary debts are property, period.

6. The opposition concedes the circuit split over whether *Eastern Enterprises* contains any holding of this Court, but argues that the split is irrelevant because the Federal Circuit and First Circuit have relied on *Eastern Enterprises* only "for principles that were already settled," presumably by *Sperry*. Opp. 21. That is wrong for reasons already explained. The Federal Circuit has extrapolated an elaborate new jurisprudence of monetary Takings from misunderstood language in the concurring and dissenting opinions in *Eastern Enterprises*. Surely a conflict over whether that case is precedential at all merits review.

7. The United States suggests that "[t]he practical significance of this case is likely limited to government employees," Opp. 27, as if that were a reason to deny review. The United States employs nearly four million people on statutory terms, with a total payroll of nearly $200 billion annually. Even if the Federal Circuit's holdings *were* relevant only to federal employees (which is not true), this case would have enormous national significance.

CONCLUSION

The petition for certiorari should be granted in its entirety, or this petition and the one filed in 04-1226 should be granted together and consolidated for argument.

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